Supreme Court, U.S.
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No. ——

In the
Supreme Court of the United States

DONNIE CLEVELAND LANCE,
Petitioner,

v.

HILTON HALL, Warden,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Georgia Supreme Court disregarded this Court's holdings in *Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), when it reversed the finding of the state habeas court that the absolute failure of petitioner's trial counsel to investigate petitioner's mental health and to present evidence of his mental health impairments during the sentencing phase of petitioner's death penalty trial constituted prejudicial ineffective assistance of counsel.

2. Whether petitioner was denied effective assistance of counsel in his capital trial, as required under this Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984), and the applicable guidelines of the American Bar Association, when the trial court denied the request by petitioner's trial counsel that a second attorney be appointed to assist in the investigation and presentation of evidence relevant to the sentencing phase of defendant's trial, thereby resulting in the total failure of trial counsel to investigate or present any evidence of critical mitigating facts.

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PETITION FOR WRIT OF CERTIORARI

This case presents the exceptional circumstance of a state Supreme Court reversing the determinations of a habeas court, which found that a defendant received ineffective assistance of counsel in his death penalty trial, that his death penalty should be vacated, and that the case should be remanded for a new sentencing trial. In an unwarranted break from this Court's precedents, the Georgia Supreme Court effectively brushed aside the habeas court's factual findings and ordered that the death penalty be reinstated despite agreeing with the habeas court that the performance of defendant's trial counsel in failing to investigate the defendant's mental health fell far below basic professional standards.

In a conclusion that cannot be reconciled with this Court's decisions in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Porter v. McCollum*, 130 S. Ct. 447 (2009), the court below concluded "as a matter of law" that petitioner suffered no prejudice as a result of counsel's failure to investigate, despite acknowledging that all experts who testified at the habeas trial agreed that petitioner suffered serious mental and psychological impairments. The Georgia Supreme Court justified its result not by rejecting the habeas court's findings as clearly erroneous, but instead by recasting the evidence of mental health impairments as "weak," even though the habeas court after hearing the testimony of four mental health experts in the course of a three-day evidentiary hearing had found the evidence to be "strong," and by concluding "as a matter of law" that such evidence would not have led to a reasonable probability of even one juror reaching a

different sentencing decision. In marked contrast to this Court's precedents, including *Rompilla* and *Williams*, the Georgia Supreme Court held that petitioner has no constitutional claim of prejudice because of the brutal nature of the murders at issue and "[petitioner's] long history of abuse against Joy Lance." Pet. App. 13a. If this were the standard, then *Rompilla*, *Williams* and the Court's recent decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009), would have come out the opposite way.

The Georgia Supreme Court's reversal of the habeas court's determination was the final stage in a perfect storm of deprivation of due process that began in the trial court when petitioner's trial counsel's request for appointment of a second defense attorney was inexplicably denied. That denial occurred even though, in the circumstances of this death penalty case, controlling professional standards (including the ABA standards) called for the appointment of a second counsel. Put in the impossible position of having to dedicate 100 percent of his energy to the complicated guilt/innocence phase of trial, and denied funds for expert witnesses to counteract the State's stable of experts, trial counsel concededly did nothing to investigate the critical mental health evidence available to him and thus offered no meaningful evidence of mitigating circumstances during the sentencing phase of the trial.

There is no dispute that trial counsel's ineffective assistance was not the result of a strategic decision. Indeed, the Georgia Supreme Court acknowledged that trial counsel sought such assistance to insure that attention was paid to the sentencing phase of the case, recognized that little or no investigation was in fact

done on that phase, and held that counsel's performance was deficient. The Georgia Supreme Court nonetheless engaged in a hypothetical hindsight review to conclude that, in its own view, petitioner was somehow not prejudiced by the deficient performance. In fact, the deficient performance flowed directly from the denial of petitioner's request that a second attorney be appointed, a denial that flew in the face of prevailing professional norms recognizing that, when a person's life is at stake, the sentencing phase is just as important as the guilt/innocence phase and demands the attention of counsel.

The Court's intervention is needed to remedy this clear denial of due process, to correct the lower court's improper doctrinal departures, and to reaffirm the fundamental constitutional principles recognized in *Rompilla*, *Wiggins*, and *Strickland*. Because the Georgia Supreme Court's misguided decision disregards the teachings of this Court's binding precedents, the Court should summarily reverse. If the Court does not order summary reversal, it should grant certiorari to address the important, recurring issues of federal law raised in this petition. In particular, it should grant certiorari to reconfirm this Court's basic principle in *Rompilla* that the appropriate test for prejudice is *not* whether it is possible that a jury could have heard mitigating evidence and still have decided on the death penalty, but is instead whether undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of culpability in sentencing and persuaded it to arrive at a different result. In addition, it should grant certiorari to provide much-needed guidance on the proper standard to apply when a trial court summarily denies appointment of second

counsel for an indigent defendant facing the death penalty. On these issues, there is lingering confusion among the lower courts that can and should be resolved by granting certiorari in this case.

LOWER COURT OPINION

The decision of the Georgia Supreme Court is reported at *Hall v. Lance*, 687 S.E.2d 809 (Ga. 2010), and reproduced at Appendix A.

JURISDICTION

The Georgia Supreme Court rendered its decision reversing the state habeas court's decision and reinstating petitioner's death sentence on January 25, 2010. Pet. App. A. This Court has jurisdiction under 28 U.S.C. § 2254 because the case presents a constitutional question involving the imprisonment of an individual in violation of the Sixth and Fourteenth Amendments to the Constitution.

CONSTITUTIONAL PROVISIONS

This case involves two constitutional provisions:

1. The Sixth Amendment to the Constitution, which provides that

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

> confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. The Fourteenth Amendment to the Constitution, which provides that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves a situation where a murder defendant is sentenced to death by a jury that is presented with no mitigating evidence and, therefore, does not consider critical and readily available evidence that could have convinced at least one member of the jury to spare the defendant's life. In the habeas proceedings below, it was established, and the state habeas court found, that petitioner's trial counsel provided ineffective assistance of counsel and that his defective performance rendered the jury's sentence unreliable. Applying this Court's precedents, the state habeas court vacated petitioner's death sentence because the jury did not consider mitigating evidence showing that petitioner was psychologically impaired, had been hospitalized for mental illness, and, because of a gun shot wound to the head, could not appreciate the criminality of his conduct or conform his actions to the requirements of the law. The Georgia Supreme Court did not purport to dispute

any of the habeas court's factual findings.[1] It nonetheless reversed and reinstated petitioner's death sentence based on its remarkable conclusion that the evidence that the state habeas court had found to be compelling and weighty was, in the Georgia Supreme Court's view, too weak to support a finding of prejudice.

A. The Trial

On November 9, 1997, Sabrina Joy Lance and Dwight "Butch" Wood, Jr. were found dead in Mr. Wood's home, victims of a violent crime. There were no witnesses to the murders. Although the scene was covered in blood, no fingerprints were discovered, no DNA evidence was recovered, and no murder weapon was ever found. There was, in short, no direct evidence linking anyone to the murders. Nevertheless, the State almost immediately began investigating petitioner Donnie Cleveland Lance, Ms. Lance's former husband. Based on circumstantial evidence, a history of abuse between petitioner and Ms. Lance, and the testimony of a jail house snitch who subsequently recanted his testimony, petitioner was indicted and tried for the murders.

Throughout the pre-trial proceedings, the trial, and the appeal that followed, Lance was represented by one attorney, Mr. J. Richardson Brannon ("Mr. Brannon" or "trial counsel"), a solo practitioner whose

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[1] The Georgia Supreme Court correctly noted that factual findings of the habeas court are accepted unless clearly erroneous, Pet. App. 4-5a, and it never found any of the habeas court's factual findings regarding the evidence to be clearly erroneous.

office at the time consisted of himself and one paralegal. Pet. App. 141a. Mr. Brannon was initially paid by petitioner's family for his services. When the family could no longer afford to retain Mr. Brannon, he continued to serve as court-appointed counsel. Pet. App. 141-142a.

On March 19, 1998, shortly after petitioner's indictment, the State filed its intent to seek the death penalty. Mr. Brannon was well-aware that in a capital case it is imperative to begin preparing for the punishment phase "right from the start." (R. 43.) But he testified at the habeas hearing that preparing for the guilt-innocence phase was a "full time job and took all of [his] efforts." Pet. App. 144a. As Mr. Brannon explained, "[b]ecause the guilt/innocence phase took all of my time, I was unable to do the necessary investigation into the penalty phase issues." *Id.*

Approximately a year after he undertook petitioner's representation, and in late November 1998 before the June 1999 start of trial, Mr. Brannon filed a motion seeking appointment of co-counsel. Pet. App. N. The motion expressed Mr. Brannon's concern that he did not have time to prepare properly for the guilt phase of trial. His motion thus stated that co-counsel was required because, among other things, "[p]reparation for the guilt-innocence phase of the trial will not be completed before preparation needs to begin for the sentencing phase of trial." Pet. App. 298a. And it emphasized that "[e]xtensive preparation must be made for the sentencing phase in order to rebut the aggravating circumstances as well as to develop mitigation evidence." *Id.* At an *ex parte* hearing on the motion, Mr. Brannon again advised the trial court that he needed an assistant to work on the

penalty phase. (R. 5258-59.) The court, however, denied Mr. Brannon's request. (R. 1384.)

Because he was stretched so thin, Mr. Brannon hardly spoke to petitioner's family members at all about issues that could possibly be presented at the penalty phase. (R. 104.) He reiterated: "As far as sitting down with the Lance family and going over mitigation punishment factors, I didn't do that." (R. 105.) Besides going through a box of things in petitioner's room, Mr. Brannon undertook no other efforts to discover mitigating evidence. (*Id.*)

The trial in this matter was conducted from June 14, 1999 through June 23, 1999. Most damaging to petitioner's defense at trial was trial counsel's complete failure to request experts to investigate petitioner's mental health. Pet. App. 88-89a. Mr. Brannon presented no evidence, either during the guilt/innocence phase of trial or during sentencing, that petitioner suffered from diminished mental capacity. *Id.* Despite several significant tell-tale signs of mental impairments due to traumatic brain injuries — including a gun-shot to the head, repeated car accidents at the local race track, years of alcohol abuse, and even past mental health problems requiring hospitalization, trial counsel did not investigate petitioner's mental health or ask a mental health professional to evaluate him. Pet. App. 94-95a. He did not review available medical records regarding petitioner's repeated head traumas; did not review available medical records regarding petitioner's hospitalization for mental health treatment; and did not inquire with either petitioner's family, friends, or any other members of the small-town community as to whether petitioner had any history of mental health

issues. *Id.* Not surprisingly, Mr. Brannon did not request the assistance of a mental health expert that could have revealed the significant mental impairments from which petitioner suffers. *Id.*

After a sentencing phase in which the defense put on no evidence, the jury sentenced petitioner to death. A member of Lance's jury testified that the decision to convict Lance and then sentence him to death was an "extremely difficult and emotional one," and the jury had to ask the court several questions about the evidence. Pet. App. 178a. According to that juror, the defense "really did not give us a reason not to sentence Petitioner to death." Pet. App. 179a. On June 23, 1999, the Superior Court of Jackson County, Georgia entered judgment against petitioner on two counts of malice murder, two counts of felony murder, one count of burglary, and one count of possession of a firearm. Petitioner was then sentenced to death by electrocution for the murders, to twenty years for burglary, and to five years for possession of a firearm during the commission of a crime.

Mr. Brannon represented petitioner on the direct appeal of his conviction and sentencing. The Supreme Court of Georgia affirmed petitioner's convictions and death sentences on February 25, 2002. *Lance v. State*, 560 S.E.2d 663 (Ga. 2002). Petitioner filed a timely petition for writ of certiorari to this Court. The Court denied certiorari on December 2, 2002, *Lance v. Georgia*, 537 U.S. 1050 (2002), and subsequently denied a petition for rehearing. *Lance v. Georgia*, 537 U.S. 1179 (2003). An execution was then set by the Superior Court of Jackson County for the week of June 2, 2003.

B. Evidence of Petitioner's Mental Impairments Adduced Before the Postconviction Court

On May 29, 2003, petitioner filed a timely Petition for Writ of Habeas Corpus and a Motion for Stay of Execution in the Superior Court of Butts County, Georgia. In response to that filing, the Georgia court entered an Order staying the execution. On August 25, 2005, petitioner filed an Amended Petition for Writ of Habeas Corpus.

After substantial discovery, the parties conducted a three-day evidentiary hearing on Lance's habeas petition from August 28, 2006 to August 30, 2006. Pet. App. 24a. The habeas court issued an order on April 28, 2009 upholding Lance's conviction but vacating his death sentence. Pet. App. B. The court concluded that Lance received ineffective assistance of counsel at the penalty phase because, among other things, trial counsel failed to investigate petitioner's mental health. Pet. App. 88-101a. In fact, as the habeas court concluded, Mr. Brannon ignored numerous indications of mental impairments, ultimately failed to identify petitioner's significantly impaired mental capacity, and, as a result, failed to present any of this clearly mitigating evidence during the sentencing phase of petitioner's trial. Relying on this Court's precedent in *Wiggins*, the habeas court vacated petitioner's death sentences. Pet. App. 96a.

Petitioner relayed his history of head injuries and alcohol abuse to the experts in the state habeas proceedings. He testified, for instance, about his multiple car wrecks and about being shot in the head by unknown assailants in 1993. (R. 793-794, 796.); *see*

also Pet. App. 185-187a. He also admitted to his history of alcohol abuse and past treatment for mental illness. (R. 234, 794, 796.); *see also* Pet. App. 185a, 187a.

The evidence presented during the state habeas hearing established that, even at the time of trial, it was well known that petitioner had suffered traumatic brain injuries. For example, petitioner was involved in wrecks while racing cars, and rarely, if ever, sought medical care following these wrecks. Pet. App. 94a. It was also common knowledge that petitioner suffered from a longstanding drinking problem. *Id.* It was well known among family and friends, that petitioner was shot in the head. *Id.* Family members testified that the gun-shot wound significantly affected petitioner's behavior and that he "was different after he got shot in the head." Pet. App. 94a, 220a, 223-224a, 256a.

All of the mental health experts who testified during habeas, including those on behalf of the State, testified that petitioner suffers from severe mental impairments that render him borderline mentally retarded. For example, Dr. David Pickar, an expert in Psychiatry and Clinical neuroscience, testified that petitioner suffers from neuropsychiatric impairments related to serious head trauma, depression, and alcohol abuse. Pet. App. 98a. Pickar acknowledged that petitioner's "neuropsychiatric dysfunction has significant implications for petitioner's behavior at the time of the murders for which he is sentenced to death." Pet. App. 98a, 262a. Similarly, Dr. Ricardo Weinstein, a neuropsychologist, testified that petitioner's test results demonstrate compromises in the frontal lobe functions, which "are responsible for executive functions of the brain." Pet. App. 97-98a,

247a. Weinstein described how petitioner's ability to make complex decisions, his ability to process information, judgment, and reasoning would all be profoundly impaired. Pet. App. 232a. Dr. Thomas M. Hyde, Clinical Instructor of Neurology at George Washington University and an expert in Behavioral Neurology, reached similar results. He concluded that petitioner was not able to plan and organize a crime that would leave no trace of evidence. (R. 359-360.); *see also* Pet. App. 187-190a.

Moreover, all of the mental health experts who diagnosed petitioner during habeas concluded that petitioner's diminished capacity impacted his culpability. For example, Pickar explained that the damage to petitioner's central nervous system would diminish his ability to "control his impulses and appropriately moderate his behavior." Pet. App. 262a. Hyde similarly testified that individuals with this type of mental condition are more prone to impulsive behaviors and lack appropriate judgment. Pet. App. 189a. Significantly, Hyde agreed with Weinstein's conclusion that petitioner's diminished capacity affected his ability to appreciate the criminality of his conduct or conform his actions to the requirements of the law. Pet. App. 190a.

Even the State's experts confirmed that petitioner suffered from significant mental impairments that would have been relevant for the jury to consider. For example, Dr. Daniel A. Martell, an expert who testified on behalf of the State, concluded that, if petitioner actually did commit the crime, his culpability would have been affected by his mental condition. Pet. App. 292-295a. Martell further testified that evidence regarding a defendant's mental illness, just like the

information available but not presented in petitioner's trial, is routinely provided in capital cases. Pet. App. 136-139a. With respect to this "significant" evidence of petitioner's mental health, Martell concluded that, in his opinion, that information should have been presented to the jury. Pet. App. 138a.

The state habeas court concluded that "[i]n light of the readily available evidence regarding Petitioner's diminished mental capacity due to traumatic brain injuries and alcohol abuse, trial counsel's failure to specifically investigate Petitioner's mental health or to seek a mental evaluation of Petitioner under these circumstances is constitutionally deficient performance." Pet. App. 96a. The habeas court also found that "all of the mental health experts [who testified at the habeas evidentiary hearing], including those employed by [the State], testified that Petitioner suffered from mental impairments that render Petitioner borderline mentally retarded, and all provided testimony that would have been extremely important for the jury to consider in determining the appropriate sentence." Pet. App. 97a. Put otherwise, the jury was "inexcusably deprived of expert testimony" regarding Lance's mental condition. Pet. App. 92-93a. In light of the expert testimony, the habeas court concluded that petitioner's mental condition significantly impairs his ability to control his actions. The habeas court found that petitioner had difficulty planning and organizing events. Pet. App. 98a. As a result, if Lance actually had committed the crime, his brain dysfunction would greatly affect his culpability for the offense. The habeas court also recognized, as Dr. Weinstein testified, that "it would be important for the fact finder to have information about Petitioner's impaired mental abilities." *Id.*

C. The Georgia Supreme Court Reverses the Postconviction Court

The State appealed the order of the habeas court to the Supreme Court of Georgia, which issued a decision on January 25, 2010 reinstating petitioner's death sentences. The Georgia Supreme Court agreed with the postconviction court that Brannon's representation of petitioner was constitutionally defective, stating: "we hold that trial counsel performed well below basic professional standards by choosing not to discuss issues other than guilt and innocence with Lance and his family even after the request for co-counsel was denied." Pet. App. 5a. Then, in contrast to this Court's holding in *Strickland* that the question of prejudice is a mixed question of law and fact, 466 U.S. 698, the Georgia Supreme Court proceeded to determine the question of prejudice de novo as a pure question of law. Pet. App. 4a, 6a, 12a, 17a. ("We conclude as a matter of law that the habeas court erred by reaching this conclusion regarding prejudice."). The Georgia Supreme Court rested its reversal of the postconviction court on two grounds: (1) that even if mental health evidence of the type adduced at the postconviction evidentiary hearing had been available at trial, the trial court presiding over petitioner's murder trial would not have authorized the funds for such "in-depth and extensive mental health evaluation," Pet. App. 6a; and (2) that, even if such a "specialized examination" had occurred, "it is essentially beyond possibility that the jury would have failed to convict [petitioner] of the murders" because of the "weakness of the new mental health evidence" when weighed against the brutal nature of the crime and petitioner's "long history of horrific abuse against

[his former wife] Joy Lance." Pet. App. 13-14a. This petition followed.

REASONS FOR GRANTING THE WRIT

The Court should summarily reverse or, alternatively, grant certiorari because the court below decided an important, recurring question of federal law — that is, how prejudice should be evaluated by a reviewing court when assessing a claim for ineffective assistance of counsel — in a manner that directly and irreconcilably conflicts with the Court's clearly established Sixth Amendment precedent. The Court should also grant certiorari to address the circumstances in which the Sixth Amendment requires, consistent with professional norms, appointment of a second defense counsel in capital cases, especially where, as here, the attorney appointed to represent the defendant has told the trial court that he is unable to fulfill his obligations and specifically requests appointment of a second counsel. *See* ABA Guideline 2.1 (1989) ("In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant.").

A. The Lower Court's Decision That An Investigation of a Defendant's Background is Not Constitutionally Required Where the Underlying Crime Is Purportedly "Intentional", "Deliberate," or Accompanied by a "History of Horrific Abuse" Is Directly At Odds With This Court's Precedents

This Court has repeatedly recognized that effective assistance of counsel requires, among other things,

that counsel for a capital defendant thoroughly investigate *all* matters relevant to a defendant's case, including any potentially mitigating evidence that could be presented during sentencing. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009). As a corollary, the Court has held that failing to present potentially mitigating evidence regarding a capital defendant's mental health prejudices that defendant precisely because the State will be pointing to aggravating circumstances to support the death penalty. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter*, 130 S. Ct. at 545. This principle applies here. Trial counsel's failure to conduct any investigation and present any evidence regarding petitioner's mental health prejudiced petitioner because the jury did not have an opportunity to consider mitigating evidence regarding petitioner's extensive history of significant head injuries and dementia — evidence that could have directly affected their assessment of petitioner's culpability. In fact, because of trial counsel's deficient performance, the jury heard no mitigating evidence at all before sentencing petitioner to death.

To demonstrate prejudice necessary to sustain a claim of ineffective assistance of counsel under *Strickland*, petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*; *see also Rompilla*, 545 U.S. at 393. More specifically, in the context of an ineffective assistance

of counsel claim based on a failure to investigate mitigating evidence, prejudice is established if "the undiscovered 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [petitioner's] culpability," and led to a different outcome.[2] *Rompilla*, 545 U.S. at 393 (quoting *Wiggins*, 539 U.S. at 538) (internal quotations omitted); *see also Porter*, 130 S. Ct. at 454 ("Had the judge and jury been able to place Porter's life history on the mitigating side of the scale, and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury -- and the sentencing judge -- would have struck a different balance." (internal quotations omitted)).

In this case, the postconviction court and the Georgia Supreme Court both agreed that trial counsel should have investigated petitioner's mental health, but the Georgia Supreme Court wielded the prejudice prong of the *Strickland* test to render irrelevant the mitigating evidence that such an investigation should have disclosed. The court did so because the case involved a brutal murder and allegations that the petitioner had engaged in prior, horrific acts toward one of the victims. It is at this point that the Georgia Supreme Court radically departed from this Court's Sixth Amendment pronouncements. The Court's precedents have not excused the need for trial counsel

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[2] Under Georgia law, petitioner need not show that a "different outcome would have been certain or even 'more likely than not.'" *Martin v. Barrett*, 619 S.E.2d 656, 658 (Ga. 2005) (citation omitted). Rather, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Miller v. State*, 676 S.E.2d 173, 174 (Ga. 2009) (internal quotation omitted).

to engage in a thorough investigation — or dismissed the concomitant prejudice resulting from failing to put before the jury significant evidence in mitigation resulting from that investigation — merely because the crime involved facts tending to show extreme depravity or brutal acts toward the victims. To the contrary, it is precisely in such cases that the need for mitigating evidence on the other side of the scale is most critical. In *Rompilla*, for example, the defendant was convicted of a horrific crime, where the evidence showed that the defendant had repeatedly stabbed a man to death and then set him on fire. *Rompilla*, 545 U.S. at 377.[3] Unlike petitioner's counsel in this case, Rompilla's trial counsel performed some investigation into the defendant's background. *Id.* at 381 (this "is not a case in which defense counsel simply ignored their obligation to find mitigating evidence"). Indeed, as the Court noted, Rompilla's counsel made "a number of efforts" to develop mitigating evidence, including interviewing Rompilla and "some members of his family," and examining "reports by three mental health experts who gave opinions at the guilt phase" of trial. *Id.* Nonetheless, despite counsel's "efforts" and despite the horrific nature of the crime, the Court found that Rompilla's counsel provided constitutionally ineffective assistance because they failed to investigate or obtain records from his prior convictions, *which would have indicated that he suffered from*

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[3] According to four Justices' dissenting opinion, the victim "had been stabbed multiple times, including 16 wounds around the neck and head. [The victim] also had been beaten with a blunt object, and his face had been gashed, possibly with shards from broken liquor and beer bottles found at the scene of the crime. After [the victim] was stabbed to death, his body has been set on fire." *Rompilla*, 545 U.S. at 397 (Kennedy, J., dissenting).

schizophrenia, organic brain damage and other disorders. *Id.* at 390-91. Because the undiscovered mitigating evidence was sufficiently compelling to "undermine confidence in the outcome actually reached at sentencing," the Court reversed Rompilla's death sentence. *Id.* at 393 (internal quotations omitted). In short, the evidence "add[ed] up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Id.*

Similarly, in *Porter v. McCollum*, the Court recently found that trial counsel's failure to obtain Porter's school, military service, or medical records, and his failure to interview Porter's family members fell below prevailing professional norms. Although "the murder was especially heinous, atrocious, [and] cruel," and although Porter had been "previously convicted" of another violent felony, the murder "was committed during a burglary" and in a "cold, calculated, and premeditated manner," those facts did not prevent a finding of prejudice. 130 S. Ct. at 449. To the contrary, the Court unanimously reversed the Florida Supreme Court's finding of lack of prejudice. *Id.* The prejudice resulted from counsel's failure to inform the jury of such facts as "(1) Porter's heroic military service . . ., (2) his struggles to regain normality upon his return from the war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." *Id.* at 454. The Court had no difficulty concluding that the failure to present this evidence resulted in prejudice sufficient to undermine confidence in the outcome of Porter's sentencing, stating that "it was not reasonable [for the Florida Supreme Court] to discount entirely the effect that

[the neuropsychologist's] testimony might have had on the jury or the sentencing judge." *Id.* at 455.

In order for the Georgia Supreme Court to rule the way it did, that court also had to disregard the Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000). As in this case, *Williams* involved circumstances where the postconviction court had found counsel's performance inadequate with resulting prejudice in a capital case due to counsel's failure to uncover and present relevant evidence in sentencing. *Williams* also involved a brutal murder in which the defendant had killed the victim with a mattock after the victim had refused to lend him "a couple of dollars." 529 U.S. at 367. Other evidence presented at sentencing showed that previously the defendant had "brutally assaulted an elderly woman" who was in a "vegetative state" and had committed a second violent assault on an elderly victim. *Id.* at 368.

The habeas court in *Williams* found

> that [Williams'] trial attorneys had been ineffective during sentencing. Among the evidence reviewed that had not been presented at trial were documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was "borderline mentally retarded," had suffered repeated head injuries, and might have mental impairments organic in origin.

Id. at 370. Looking at this evidence, similar to what petitioner presented at habeas in the case at bar, the

Virginia Supreme Court "assumed, without deciding, that trial counsel had been ineffective." *Id.* at 371 (citing *Williams v. Warden*, 254 Va. 16, 23-26 (1997)). The Virginia Supreme Court, like the Georgia Supreme Court here, "disagreed with the trial judge's conclusion that Williams had suffered sufficient prejudice to warrant relief." *Id.* This Court reversed the Virginia Supreme Court's prejudice determination. *Id.* at 396-97. The Court held that the totality of the mitigating evidence that counsel would have uncovered and presented if trial counsel had acted competently, including evidence that the defendant was "borderline mentally retarded," "might well have influenced the jury's appraisal of [the defendant's] moral culpability." *Id.* at 398.

If the defendants in *Rompilla*, *Porter* and *Williams* demonstrated prejudice as a result of the trial counsel's failure to investigate and present evidence regarding diminished mental capacity, petitioner here also undoubtedly suffered prejudice as a result of his trial counsel's concededly deficient performance. Failure to present any evidence of these impairments certainly "undermine[d] confidence in the outcome actually reached at sentencing." *Rompilla*, 545 U.S. at 393; *Porter*, 130 S. Ct. at 455-56 (internal quotations omitted).

In Georgia, the vote of a single juror is sufficient to mandate imposition of a life sentence. Thus, in determining prejudice, the assessment must be whether there is a "reasonable probability" that the mind of any single juror could have been changed with respect to the imposition of the sentence of death. *Wiggins*, 539 U.S. at 537 ("there is a reasonable probability that at least one juror would have struck a

different balance"); *Porter*, 130 S. Ct. at 455-56. As one of the jurors in petitioner's case explained, the defense "really did not give us a reason not to sentence petitioner to death," but had the defense presented evidence to suggest that the "murders were anything less than cold-blooded and planned" or that petitioner "was mentally ill or mentally impaired," the jury's verdict might have been different. Pet. App. 179a.

It bears heavy emphasis that, during the habeas proceedings, the parties did not dispute petitioner's diminished mental capacity. In fact, the mental health experts who examined Petitioner — including the State's expert — each independently concluded that petitioner's mental impairments may have affected his ability to control his behavior. Both the State's expert, Dr. Martell, and the defense experts concluded that petitioner suffered from a level of impairment described in DSM-IV as "dementia due to alcohol abuse and head trauma." Pet. App. 97a, 98a, 293a. (Dr. Pickar concluded that that petitioner suffers from dementia due to head trauma and depression and that "[t]he damage to Lance's central nervous system and related neuropsychiatric dysfunction significantly impair Lance's ability to control his impulses and appropriately moderate his behavior."); Pet. App. 262a. (Dr. Weinstein stated that "[f]rontal lobe dysfunction, such as that suffered by Lance, manifests in impaired social judgment, impulsivity, inability to appropriately interpret feedback from the environment, impaired judgment, and inability to adequately reprocess and change course when faced with evolving facts."); Pet. App. 128-130a, 247a. (Dr. Weinstein further stated that "this kind of brain dysfunction . . . negatively impacts [Lance's] ability to conform his conduct to the requirements of the law," meaning that "there is a

diminished capacity in the understanding and the actual conforming [Lance's] behavior due to [a] significant brain dysfunction."); Pet. App. 129a. (Dr. Martell concluded that "if [Petitioner] is indeed guilty, then the role of his brain dysfunction warrants further discussion.") Pet. App. 293a. As the habeas court noted in its thorough discussion of the testimony it had heard, the evidence of mental impairments was strong and constituted significant mitigating evidence that the jury should have considered, particularly in light of this Court's controlling decisions. Pet. App. 101a. ("*In light of the strength of the mental health evidence offered at the habeas hearing,* the Court further finds that there is a reasonable probability that, but for these deficiencies in trial counsel's performance, the outcome of the proceedings would have been different."). Failure to present any of this evidence to the jury, and the complete failure to give any reason for the jury not to sentence petitioner to death, clearly undermined the confidence of the experienced habeas court in the jury's outcome.[4]

To reverse the habeas court's determination, the Georgia Supreme Court employed an outcome-determinative analysis, re-visiting the factual findings of the habeas court and ultimately re-writing a standard for determining prejudice that is flatly at odds with the teachings of this Court's precedents.

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[4] Indeed, although not an issue that petitioner is making the subject of this petition, petitioner's lack of capacity to plan and organize, as testified by Dr. Hyde, is also evidence that petitioner believes the jury should have heard in the guilt-innocence phase in reaching a determination of whether petitioner was capable of executing a crime that left behind so little physical evidence of any type.

The Georgia Supreme Court found an absence of prejudice "as a matter of law" by substituting its judgment for that of the habeas court on evidentiary issues. For example, the Supreme Court concluded that "there is no reasonable probability that the information available to trial counsel through a reasonable initial investigation into Lance's mental health background would have led the trial court to grant funds for the type of in-depth and extensive mental health evaluation upon which Lance now largely relies." Pet App. 6a. This is a strange conclusion given that habeas counsel, after their initial investigation into petitioner's mental health, reached precisely the opposite conclusion and arranged for precisely the testing that the Georgia Supreme Court held there to be "no reasonable probability" of arranging, which, in turn, prompted the State to also conduct testing that reached remarkably similar results. *Id.* More fundamentally, to the extent the Georgia Supreme Court is suggesting that trial counsel's admittedly deficient failure to investigate could have been "cleansed" by a trial court's refusal to authorize funds for experts in the face of an adequate investigation, the Supreme Court is adopting an exception to the *Rompilla* standard that would swallow the rule and that cannot possibly be a correct statement of the law. Trial counsel's ineffective performance cannot become constitutionally sufficient simply because there is a possibility that, had trial counsel actually provided effective assistance of counsel and sought to investigate mental health, the trial court might not have granted funds to support the investigation. But of course, that hypothetical issue never arose here because no investigation whatsoever was conducted.

Further, the Georgia Supreme Court recast the basis for the habeas court's findings, characterizing what the habeas court considered as "strong" evidence into "weak" evidence. After discussing the trial testimony from the experts who testified before it, the habeas court held, *"[i]n light of the strength of the mental health evidence* offered at the habeas hearing, . . . there is a reasonable probability that, but for these deficiencies in trial counsel's performance, the outcome of the proceedings would have been different." Pet. App. 101a (emphasis added). The Supreme Court turned this finding on its head, choosing selected portions of the testimony and concluding that *"[g]iven the weakness of the new mental health evidence* and the overwhelming evidence of the intentional and deliberate nature of Lance's crimes" (emphasis added) it was "essentially beyond possibility" that the jury would have failed to convict Lance and "highly unlikely" that the jury would have reached a different sentencing conclusion. Pet. App. 14a. The Georgia Supreme Court simply cannot circumvent this Court's constitutional standards by characterizing the evidence introduced during habeas in a way that flatly conflicts with the fact-finder's conclusions.

In the final analysis, the Georgia Supreme Court failed to apply the standard for prejudice set forth in *Strickland*, *Rompilla*, *Williams* and *Porter* when it concluded as a matter of law that the mitigating evidence would not have likely affected the jury's determinations. While any habeas proceeding necessarily involves some degree of hindsight analysis as to what is likely, when the death penalty is at issue and one juror's vote can spell the difference between life and death, the notion that an appellate court should put a strong thumb on the scale in interpreting

the evidence against the defendant runs contrary to this Court's warning in *Rompilla* that

> although we suppose it is possible that a jury could have heard [all of this evidence] and still have decided on the death penalty, *that is not the test*. It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Rompilla's culpability and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing.

Rompilla, 545 U.S. at 393 (emphasis added) (quoting *Wiggins*, 539 U.S. at 538; *Strickland*, 466 U.S. at 694) (internal quotations omitted).

Here, the Georgia Supreme Court's focus on whether, even with the mitigating evidence, the jury would have reached the same result "is not the test." *Id.* All parties agree petitioner suffered from mental impairments that were never investigated. The Georgia Supreme Court failed to give appropriate deference to the habeas court's determination that the mitigating mental health evidence which was not presented to the jury, taken as a whole, might well have influenced the jury's sentencing decision and persuaded it to spare Lance's life. Under this Court's rulings in *Rompilla, Williams* and *Porter* the Georgia Supreme Court's determination is constitutionally infirm and should be summarily reversed. *E.g.*, *Porter*, 130 S. Ct. at 454 (prejudice resulted when the jury "heard absolutely none of that evidence, evidence which might well have influenced the jury's appraisal

of [Porter's] moral culpability" (internal quotations omitted)).

B. This Court Should Grant Certiorari to Review Whether Appointment of a Second Defense Lawyer in Petitioner's Case Was Constitutionally Required

Petitioner's ineffective assistance claim in this case stems, in substantial part, from the fact that he was represented by only one lawyer despite trial counsel's pleas for the appointment of a second lawyer to assist in the preparation for the penalty phase of petitioner's trial. The trial court in this case forced trial counsel to go it alone, and this failure to appoint a second lawyer led to trial counsel's failure to investigate the readily available evidence of petitioner's mental impairments and failure to present any of this critical mitigating evidence in the sentencing phase of Petitioner's trial. The Georgia Supreme Court's failure to recognize that ineffective assistance stemming from this infirmity conflicts with guidelines promulgated by the American Bar Association regarding the defense of capital cases and simply cannot be squared with this Court's precedent.

The 1989 American Bar Association Guidelines in effect at the time of Lance's trial state: "In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant." ABA Guideline 2.1. The commentary to this guideline explains that

> the defendant [in a capital case] is constitutionally entitled to legal assistance of sufficient quality so as to prepare an adequate

> defense at trial. . . . In the context of capital litigation, *this mandate is difficult to fulfill where the heavy responsibilities of representation are placed in the hands of a single attorney.*

(Emphasis added). Of course, as this Court has held, these ABA Guidelines articulate "reasonable" professional "standards for capital defense work" and constitute "standards to which [the Supreme Court] long ha[s] referred as 'guides to determining what is reasonable'" under the Sixth Amendment. *Wiggins*, 539 U.S. at 524 (citation omitted).

Some of the most experienced practitioners in the defense of capital cases consider this two-lawyer requirement to be "one of the most fundamental, bedrock requirements of the ABA Standards for effective representation in a capital case." Pet. App. 157a. Stephen Bright, one of the country's leading experts in death penalty law and defense, testified in this proceeding that he would not even consider defending a capital case alone:

> Defending a capital case is an overwhelming task for a team of lawyers and investigators. In one case in which we had four lawyers on a defense team in a capital case, we all were quite busy. In my opinion, *it would be virtually impossible for a single lawyer to handle effectively all aspects of a capital case.*

Pet. App. 157a (emphasis added). Even though he is one of the most experienced death penalty lawyers in the country, Mr. Bright stated: "I certainly would not

undertake to represent someone in a capital case without an experienced co-counsel." Pet. App. 157a.

By December 1998, it was apparent to Mr. Brannon that the burdens of defending Lance were simply more than a sole practitioner could handle alone. At the time he accepted the case, Mr. Brannon was not aware that the State would rely upon and attempt to introduce evidence relating to some 30 prior incidents or "bad acts" involving Lance. Pet. App. 118a, 146-147a. Mr. Brannon had to be prepared to defend against and rebut the State's evidence relating to all of these incidents, and, as a result, he found that he had "30 other cases to defend at trial," instead of just one. Pet. App. 118a. To investigate all of the incidents required interviewing a large number of witnesses. *Id.* In a supplemental witness list served shortly before trial, the State identified over 140 potential witnesses it might call. Pet. App. 145a.

Thus, Mr. Brannon filed a motion for appointment of a second attorney. Pet. App. N. Mr. Brannon pointed out the number of witnesses involved in the case along with the other extensive work the case required, including analyzing scientific and expert evidence and reviewing and staying apprised of relevant judicial precedent from the Georgia Supreme Court and other state and federal appellate courts. Pet. App. 297a. Mr. Brannon also pointed out that "[e]xtensive preparation must be made for the sentencing phase in order to rebut the expected aggravating circumstances as well as to develop mitigating evidence. Pet. App. 298a. Finally, Mr. Brannon argued that Georgia law required appointment of "one or more attorneys" in a capital case and that the American Bar Association Standards

likewise required the appointment of two attorneys in a capital case. Pet. App. 299a.

The trial judge nonetheless refused to appoint co-counsel, leaving Mr. Brannon in an untenable situation. He had too much to do, had no additional counsel to assist, and had limited time. By Mr. Brannon's own account, he was unable to investigate the 30 prior incidents the State intended to rely on at trial or even to interview all of the witnesses on the State's witness list. Pet. App. 125-127a. Because he was so consumed with preparing for the guilt-innocence phase of the trial, Mr. Brannon was unable to prepare adequately for the sentencing phase of the trial. Pet. App. 141a. The constraints he faced materially contributed to Mr. Brannon's failure to discover and present significant mitigating mental health evidence in both phases of petitioner's trial, to petitioner's great prejudice.

In its order concluding that petitioner did not suffer from ineffective assistance of counsel, the Georgia Supreme Court completely ignored this constitutional infirmity. Indeed, the court did not mention the failure to appoint a second lawyer in its discussion of effective assistance and certainly did not distinguish this case from those in which this Court has previously found the ABA Guidelines to establish *minimum* standards for representing capital defendants. *See Wiggins*, 539 U.S. at 524 (citation omitted). These ABA Guidelines are "standards to which [the Supreme Court] long ha[s] referred as 'guides to determining what is reasonable'" under the Sixth Amendment. *Id.* Under *Wiggins* and the ABA Guidelines applicable at the time of petitioner's trial, the Sixth Amendment required that petitioner be represented by at least two

lawyers. He was not, and this simple fact was critical in the inadequate investigation and presentation of evidence at the sentencing phase. For this independent reason, the Georgia Supreme Court's rejection of petitioner's ineffective assistance claim based on this failure to appoint a second lawyer cannot be allowed to stand, and the Court should grant certiorari to evaluate the circumstances in which the Constitution dictates the appointment of a second defense counsel at a capital trial in order for the defendant to receive the effective assistance of counsel required under the Sixth Amendment.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court summarily reverse the judgment of the Supreme Court of Georgia because that court's decision contravenes established law regarding application of the prejudice prong of *Strickland*. If the Court does not order summary reversal, it should grant certiorari to address the important, recurring issues of federal law raised in this petition.

This 23rd day of April, 2010.

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APPENDIX

APPENDIX

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APPENDIX A

SUPREME COURT OF GEORGIA

Nos. S09A1536, S09X1538

[Filed January 25, 2010]

HALL	)
	)
v.	)
	)
LANCE.	)
	)
Lance	)
	)
v.	)
	)
Hall.	)
	)

Hunstein, Chief Justice.

A jury convicted Donnie Cleveland Lance of two counts of murder and of related crimes in connection with the deaths of his ex-wife, Sabrina "Joy" Lance, and her boyfriend, Dwight "Butch" Wood, Jr. The jury sentenced Lance to death for each of the murders, and this Court affirmed his convictions and sentences unanimously. *Lance v. State,* 275 Ga. 11, 560 S.E.2d 663 (2002). Lance filed a petition for a writ of habeas corpus on May 29, 2003, and he amended the petition on August 25, 2005. After conducting an evidentiary

hearing, the habeas court granted the petition with respect to Lance's death sentences and denied the petition with respect to his convictions. The Warden has appealed in Case Number S09A1536, and Lance has cross-appealed in Case Number S09X1538. In the Warden's appeal, we reverse and reinstate Lance's death sentences. In Lance's cross-appeal, we affirm.

I. *Factual Background*

The evidence at trial showed that Lance had a long history of abusing Joy Lance both before and after they divorced, including kidnapping her, beating her with his fist, a belt, and a handgun, strangling her, electrocuting her with a car battery, and threatening her with a flammable liquid, handguns, and a chainsaw. He had repeatedly threatened to kill her himself, and he had once inquired of a relative about what it might cost to hire someone to kill her and Butch Wood. Lance kicked in the door of Butch Wood's home in 1993 armed with a shotgun, loaded a shell into the chamber of the shotgun, and then fled only after a child in the home identified and spoke to Joe Moore, Lance's friend who was accompanying Lance that night.

Shortly before midnight on November 8, 1997, Lance called Joy Lance's father, asked to speak to her, and learned that she was not at home. Shortly afterward, a passing police officer noticed Lance's automobile leaving his driveway. Lance arrived at Butch Wood's home, kicked in the front door, shot Butch Wood on the front and the back of his body with a shotgun, and then beat Joy Lance to death by repeatedly striking her in the face with the butt of the shotgun, which broke into pieces during the attack.

Joy Lance's face was rendered utterly unrecognizable. Later that morning, Lance told his friend, Joe Moore, that Joy Lance (whom Lance referred to in a derogatory manner) would not be coming to clean Lance's house that day; that Butch Wood's father could not "buy him out of Hell"; and that both Joy Lance and Butch Wood were dead. Lance later told a fellow inmate that he "felt stupid" that he had called Joy Lance's father before the murders, and Lance bragged to the inmate that "he hit Joy so hard that one of her eyeballs stuck to the wall."

II. *Alleged Ineffective Assistance of Counsel*

Lance argued in the habeas court that his trial counsel rendered ineffective assistance in various ways during both the guilt/innocence phase and the sentencing phase. An ineffective assistance of counsel claim must show that counsel rendered constitutionally-deficient performance and that actual prejudice of constitutional proportions resulted. *Strickland v. Washington,* 466 U.S. 668, 687 (III), 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. Francis,* 253 Ga. 782(1), 325 S.E.2d 362 (1985). The constitutional standard for attorney performance is determined with reference to "prevailing professional norms." *Strickland,* supra at 688(III)(A), 104 S.Ct. 2052. See also *Hall v. McPherson,* 284 Ga. 219(2), 663 S.E.2d 659 (2008) (noting relevance of published professional guidelines in assessing what might have been reasonable in a particular case). A review of an attorney's performance "includes a context-dependent consideration" of counsel's decisions that sets aside the "'distorting effects of hindsight.'" *Wiggins v. Smith,* 539 U.S. 510, 523(II)(A), 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). To show sufficient prejudice to succeed on an

ineffective assistance of counsel claim, a petitioner must demonstrate that

> there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [Cit.]

Smith v. Francis, supra at 783(1), 325 S.E.2d 362. We accept the habeas court's findings of fact unless they are clearly erroneous, but we apply the facts to the law de novo. *Lajara v. State,* 263 Ga. 438(3), 435 S.E.2d 600 (1993). Because an ineffective assistance of counsel claim must show both deficient attorney performance and prejudice, the claim can be denied solely on the absence of sufficient prejudice. Id. For the reasons set forth below, we conclude as a matter of law that the absence of the deficiencies in Lance's trial counsel's performance would not in reasonable probability have resulted in a different outcome in either phase of Lance's trial. See *Schofield v. Holsey,* 281 Ga. 809, 812, n. 1, 642 S.E.2d 56 (2007) (holding that the combined effect of trial counsel's deficiencies should be considered in weighing prejudice). Accordingly, we reverse the habeas court's judgment insofar as it granted a new sentencing trial based on trial counsel's ineffectiveness, and we affirm the habeas court's judgment insofar as it denied relief regarding the guilt/innocence phase based on trial counsel's ineffectiveness.

A. *Mental Health Evidence*

The habeas court concluded that trial counsel performed deficiently in failing to prepare for Lance's

trial by investigating Lance's background. We agree. The record is clear that, while trial counsel met repeatedly with Lance and with various members of his family, trial counsel failed to question them on issues related to potential mitigating evidence other than those issues related to residual doubt as to Lance's guilt. Trial counsel testified in the habeas court that Lance claimed that he was innocent, that his family members believed that he was innocent, and that trial counsel did not want to alienate them by asking questions related to what could be presented at trial in the event that Lance were convicted. Trial counsel explained that he had hoped to obtain the assistance of co-counsel so that co-counsel could discuss the sentencing phase with them. However, we hold that trial counsel performed well below basic professional standards by choosing not to discuss issues other than guilt and innocence with Lance and his family even after the request for co-counsel was denied. The Warden argues that trial counsel did not perform deficiently because counsel's strategy of relying on jurors' residual doubt in the sentencing phase was reasonable. See *Head v. Ferrell,* 274 Ga. 399, 405(V)(A), 554 S.E.2d 155 (2001) (reliance on residual doubt can be a reasonable strategy in the sentencing phase). However, trial counsel's performance in selecting a strategy must be regarded as deficient because that strategic choice was made without trial counsel's first conducting a reasonable investigation. See *Wiggins,* supra, 539 U.S. at 521-523(II)(A), 123 S.Ct. 2527; *Strickland,* supra, 466 U.S. at 690-691(III)(A), 104 S.Ct. 2052. See also *Porter v. McCollum,* --- U.S. ----, ----(II), 130 S.Ct. 447, 452-453, 175 L.Ed.2d 398 (2009). The question then before us is whether trial counsel's deficient performance in failing to adequately investigate issues

beyond guilt and innocence, when considered together with any other deficiencies in trial counsel's performance at trial, in reasonable probability changed the outcome of Lance's trial. We hold as a matter of law that it did not.

The habeas court concluded that there would have been a reasonable probability of a different outcome in the sentencing phase of Lance's trial if trial counsel had prepared properly for the sentencing phase, because that preparation would have led counsel to discover and use mental health evidence. We disagree with this conclusion for two independent and individually-sufficient reasons, which are discussed below. We also disagree with Lance's contention in his cross-appeal that an adequate investigation of mental health evidence would have led to a reasonable probability of a different outcome in the guilt/innocence phase.

1. *Mental Health Evidence Likely Available*

First, we conclude that there is no reasonable probability that the information available to trial counsel through a reasonable initial investigation into Lance's mental health background would have led the trial court to grant funds for the type of in-depth and extensive mental health evaluation upon which Lance now largely relies. If trial counsel had properly interviewed lay witnesses, he would have discovered the following allegations about Lance's past: Lance had been in a number of automobile crashes, including some that might have resulted in brief unconsciousness and one that was caused by his fleeing from the police while drunk; Lance had once been exposed to toxic fumes while cleaning the inside

of an oil tank; Lance had once ingested some gasoline as a child and had temporarily stopped breathing; Lance had a long history of abusing alcohol; and Lance had once suffered a shot to the head, which did not penetrate his skull, which led to his being hospitalized followed by his leaving the hospital against medical advice, and which resulted in recurring headaches. Trial counsel also could have obtained records from Georgia Regional Hospital, but those records would have informed trial counsel merely that Lance was having difficulty adjusting to his divorce, that he was depressed, that his depression was associated with his facing kidnapping and aggravated assault charges for an alleged attack on his ex-wife, and that he abused alcohol.

We find it doubtful that this information would have led reasonable counsel to seek a psychological evaluation of Lance, particularly given the reasonableness of trial counsel's stated desire to prioritize his requests for funds for various experts. Nor would the trial court have abused its discretion, if it had been asked by trial counsel for funds for a psychological evaluation of Lance, by determining that this information failed to show that the assistance of a psychologist was critical to Lance's defense. See *Roseboro v. State,* 258 Ga. 39(3)(d), 365 S.E.2d 115 (1988). This is particularly true because Lance had already been examined in a psychological hospital and yet no obvious symptoms of impairment were noted other than Lance's alcohol abuse and his failure to adjust to his divorce. Finally, even if the trial court had exercised its discretion to order a psychological examination, we find that it would have been extremely appropriate and thus highly likely that the trial court would have first ordered a general

psychological screening rather than the extensive neuropsychological examination that Lance has undergone during his habeas proceedings. The probable result of such a general psychological examination is suggested by the absence of any reference to neuropsychological difficulties in the records from Lance's psychological evaluation at Georgia Regional Hospital (as discussed above) and by the habeas testimony from the Warden's neuropsychologist, asserting that a typical court-ordered psychological examination might not have shown any cause for a more detailed neuropsychological examination "because of the relatively mild nature" of Lance's mental neurological deficits. Accordingly, we conclude that it is unlikely that the trial court would have been informed through a general psychological examination of any possibly significant neurological deficits and, more importantly, that it is unlikely that the trial court would have exercised its discretion, in the face of such mild symptoms, to order a full neuropsychological examination. Given the multiple levels of unlikelihood at issue here – that reasonable counsel would seek an evaluation, that the trial court would grant the request, that the initial evaluation would give any suggestion of a need for a full neuropsychological examination, and that the trial court would have ordered a full neuropsychological examination – we conclude that there is no reasonable probability that a reasonable investigation of Lance's background by counsel would have led to his having access to the type of specialized neuropsychological testimony that Lance has presented in the habeas court.

We do note the significant likelihood that a general psychological examination would have included an

assessment of Lance's intelligence. However, none of the experts has diagnosed Lance as falling within the generally-accepted definition of mental retardation. Upon our review of all of the evidence presented at trial and shown in the habeas court to have been available to trial counsel, we conclude that evidence of Lance's moderate slowness would not have had a significant effect on the jury's sentencing phase deliberations, particularly in light of the evidence showing that Lance functioned normally in society apart from his criminal behavior. We also conclude that this evidence of moderate slowness would have had essentially no effect on the jury's guilt/innocence phase deliberations. Compare OCGA § 17-7-131(a)(3) and (j) (allowing for guilty but mentally retarded verdicts in the guilt/innocence phase that exempt defendants from the death penalty).

2. *Additional Mental Health Evidence Conceivably Available*

Above, we have analyzed the prejudice portion of Lance's ineffective assistance of counsel claim in light of our conclusion that there is no reasonable probability that trial counsel, if he had adequately investigated Lance's background, ultimately would have obtained an extensive neuropsychological examination like the one Lance has relied upon in the habeas court. We now turn to our alternative analysis of prejudice, which begins with the assumption that trial counsel would have obtained such a specialized examination.

Lance presented testimony in the habeas court from three experts in neuropsychology. Thomas Hyde, M.D., Ph.D., testified that he administered over 100

neurological tests to Lance. Yet, as his testimony establishes, only one of those tests indicated brain dysfunction. Dr. Hyde concluded that Lance had "significant damage to the frontal and temporal lobes" resulting from multiple blows to the head and from alcohol abuse. He testified that persons with frontal lobe dysfunction "often decompensate under periods of extreme emotional distress." He also testified that such persons are unlikely to be able to plan and commit murder without leaving evidence but, instead, are more often "involved in crimes of impulse." Dr. Hyde concluded that Lance's mental state might have had an "impact" on Lance's "ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," but he also acknowledged that other "reasonable" neurologists might disagree with his conclusions in Lance's case. The second of Lance's three experts in neuropsychology, Ricardo Weinstein, Ph.D., commented generally on Lance's "psychosocial history" as follows:

> [I]t's a relatively unusual case in terms of his upbringing, fairly normal upbringing from an intact family, no major history of dysfunction, no history of child abuse, neglect, things of that nature, no history of significant mental illness in the family.

However, Dr. Weinstein concluded that Lance, as a result of multiple head injuries, the exposure to toxic fumes, the ingestion of gasoline, and a history of "heavy alcohol use starting at the age of 19," suffered from "generalized and diffuse brain dysfunction" and "clear compromises in the frontal lobe functions." Dr. Weinstein concluded that Lance was not insane or mentally retarded, that he understood "that certain

behaviors are unacceptable," but that his "brain dysfunction ... negatively impact[ed] his ability to conform his conduct to the requirements of the law." In particular, Dr. Weinstein concluded that Lance would have difficulty in planning and in impulse control and that the combined effects of Lance's brain dysfunction and his alcohol intoxication on the night of the murders would have rendered "his capacity to think in a logical, well-directed manner ... equivalent or similar to an individual that suffers from mental retardation." Finally, Lance presented testimony from a third expert, David Pickar, M.D., who concluded that Lance, as a result of multiple head traumas and alcohol abuse, suffered from "impaired intellectual and frontal lobe function" that resulted in impairments of his ability to plan and to control his impulses.

The Warden presented expert testimony from one[1] neuropsychologist, Daniel A. Martell, Ph.D. Dr. Martell's findings regarding Lance's IQ were consistent with those of Lance's experts, and he concluded that Lance functioned within "a range that's higher than mild mental retardation but lower than average." Dr. Martell added, however, that he had administered an additional test to determine what Lance's IQ had been before any possible brain injuries and that the test showed Lance's earlier IQ to fall within the "exact same ranges" as found by the various

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[1] The Warden also placed in the record a report by David Griesemer, M.D. However, as Lance correctly noted in a written objection, this unsworn statement was inadmissible hearsay that should not have been considered by the habeas court. See *Waldrip v. Head*, 279 Ga. 826, 828(II)(A), 620 S.E.2d 829 (2005). But see OCGA § 9-14-48(a) (providing that a habeas court "may receive proof by ... sworn affidavits").

experts who testified in the habeas court. Dr. Martell testified that some of Lance's test results indicated frontal lobe dysfunction, but Dr. Martell further testified as follows:

> His weaknesses with regard to frontal lobe have to do with a tendency to perseverate or repeat himself and mild to moderate impairment in problem-solving abilities in certain contexts like adapting to changing problems but not others like planning an effective strategy for solving a problem. However, his ability to inhibit unwanted or impulsive behaviors appears to be relatively intact. And I think that's important in my analysis with regard to the issue of the crime itself because these data do not suggest to me that he is, in fact, impulsive or unable to control his impulses.

Dr. Martell concluded that Lance's frontal lobe dysfunction would not have prevented him from planning the murders and would not have made him so impulsive that he could not prevent himself from committing the murders. As we noted above, Dr. Martell also stated that Lance's symptoms were so subtle that a typical court-ordered evaluation might not have given any indication of problems. Dr. Martell summarized his opinion by stating, "In my opinion, [Lance's diagnosis is] not significant to the crime."

The habeas court considered the mental health evidence summarized above and concluded that presentation of that evidence at trial in reasonable probability would have changed the outcome of the sentencing phase. We conclude as a matter of law that the habeas court erred by reaching this conclusion

regarding prejudice. We agree with Lance's argument that trial counsel could have presented mental health evidence without abandoning his sentencing phase strategy of showing residual doubt because the mental health evidence was not directly inconsistent with that theory and might have enhanced it slightly, e.g., by indicating that, due to Lance's mental condition, it might have been more difficult for him to have carried out the murders without leaving more evidence than was actually discovered during the investigation of the crimes. However, assuming trial counsel would have chosen to present the mental health evidence, even the most favorable aspects of that evidence showed merely that Lance functioned, when sober, in the lower range of normal intelligence; that he had some memory problems; that he suffered some depression related to his inability to accept his divorce; that he had some difficulty in planning and problem solving; that he might have been somewhat impulsive; and that his functional intelligence, unsurprisingly, became more impaired when he was drunk. Against this somewhat mitigating evidence, the jury would have weighed Lance's long history of horrific abuse against Joy Lance, including multiple threats to kill her and at least one previous attempt to murder Butch Wood in a manner that was very similar to the manner in which he eventually succeeded in murdering him and Joy Lance. The jury also would have weighed the new evidence against the evidence about the night of the murders, which showed that Lance armed himself with a shotgun, traveled to the home where the victims were staying, kicked in the door, and systematically murdered them. Finally, the jury would have weighed the new evidence against the evidence about Lance's demeanor and conduct after the murder, including the derogatory manner in which he referred

to Joy Lance, his statement that Butch Wood was in "Hell," his lament to an inmate that he had acted foolishly by calling Joy Lance's father shortly before committing the murders, and his boast to an inmate that "he hit Joy so hard that one of her eyeballs stuck to the wall." Given Lance's long history of contemplating the murder of Joy Lance and Butch Wood, the manner in which he finally carried out their murders, and his utter disregard for their suffering and deaths afterward, we conclude that the new evidence of Lance's subtle neurological impairments, even when considered together with the other mitigating evidence that was or should have been presented at trial, would not in reasonable probability have changed the outcome of the sentencing phase if it had been presented at Lance's trial. Compare *Porter v. McCollum*, supra, --- U.S. at ----(III), 130 S.Ct. at 453-456.

We also conclude, contrary to Lance's arguments in his cross-appeal, that the new evidence of subtle neurological impairments would not have significantly affected the jury's deliberations during the guilt/innocence phase. Given the weakness of the new mental health evidence and the overwhelming evidence of the intentional and deliberate nature of Lance's crimes, we conclude that it is essentially beyond possibility that the jury would have failed to convict Lance of the murders. We further conclude that it would have been highly unlikely that the new mental health evidence would have led the jury to render a verdict of guilty but mentally ill, which would not foreclose a death sentence in any event. See OCGA § 17-7-131(a)(2) (defining "[m]entally ill"). See also *Lewis v. State*, 279 Ga. 756, 764(12), 620 S.E.2d 778 (2005) (holding that "the statute that provides for a

verdict of guilty but mentally ill does not preclude a death sentence as the result of such a verdict").

B. *Evidence from Forensic Experts*

Lance argues that his trial counsel rendered ineffective assistance in the manner in which he sought funds for forensic experts and, alternatively, that the trial court's denial of those funds rendered trial counsel ineffective at trial. We conclude that both of these claims lack merit.

1. *Trial Counsel's Alleged Ineffective Assistance in Seeking Funds*

We first address Lance's contention that his trial counsel rendered ineffective assistance in the manner in which he sought funds for forensic experts. We conclude that trial counsel did not perform deficiently, and we further conclude that Lance did not suffer significant prejudice to his defense even if trial counsel could be perceived as having performed deficiently.

On direct appeal, this Court rejected a claim that the trial court had abused its discretion in denying Lance's request for additional funds for expert assistance, concluding that "Lance's request for the contested funds [had been] too unspecific, uncertain, and conclusory" to require the granting of additional funds. *Lance,* supra, 275 Ga. at 13-14(2), 560 S.E.2d 663. Although this Court's comments, on the surface, might suggest that trial counsel necessarily performed deficiently in making his request, upon closer examination we conclude that he did not. Instead, we conclude that trial counsel's request for funds appeared weak simply because there was no

compelling reason for those funds to be granted. See *Roseboro,* supra, 258 Ga. at 40-41(3)(c) and (d), 365 S.E.2d 115(holding that a request for funds for expert testimony must show, inter alia, that the testimony is crucial and is subject to varying expert opinions).

Lance complains that trial counsel failed to obtain expert assistance in order to show the time of the victims' deaths. Our review of the record reveals that there is, even now, no substantial dispute among the experts regarding the time of death but, instead, that there is merely a dispute over the manner in which the time of death was established. Lance argues that his trial counsel should have obtained an expert to testify that the repeated blows to Joy Lance's face with the butt of the shotgun likely would have resulted in the perpetrator being spattered with blood and brain matter, which would then have likely left stains in any automobile used immediately afterward. However, not only would this fact have been obvious to the jury, it furthermore would have been consistent with Lance having disposed of any bloody clothes at the same time he obviously disposed of his distinctive shoes and would have been consistent with the testimony from a State witness indicating that Lance said he had initially walked away from the crime scene rather than driving away in his automobile. Lance argues that his trial counsel should have obtained an expert to testify that there were no shoe prints at the crime scene other than the one on the front door and that scientific testing could not establish the time when the shoe print on the door was made. However, the absence of shoe prints was not a matter that was subject to varying scientific opinions, and the time at which the print was left on the door was a matter of common sense given the fact that the door had obviously been

kicked in during the murders and the fact that the shoe print matched shoes that Lance wore. Similarly, it was a matter of common sense and not subject to varying scientific opinions that it was possible that the murders could have been committed by more than one person and that the identity of the perpetrator could not be determined by fingerprint evidence because no identifiable fingerprints had been discovered. Finally, Lance complains that his trial counsel failed to obtain an expert in polygraph science to testify that the results of the polygraph examination taken by Joe Moore[2] were "inconclusive" in response to the testimony volunteered by Joe Moore indicating that he had passed his polygraph test. However, Moore's volunteered testimony was ruled inadmissible, and the jury was instructed to disregard it. See *Waldrip*, supra, 279 Ga. at 830-831(II)(C), 620 S.E.2d 829 (addressing admissibility of polygraph results in death penalty trials).

Because, as we have briefly outlined above, none of the expert testimony that Lance contends his trial counsel should have obtained was crucial to his defense, we hold as a matter of law both that trial counsel did not perform deficiently in the manner in which he sought funds for that testimony and that Lance did not suffer prejudice by trial counsel's failure to obtain funds for that testimony.

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[2] Joe Moore was the friend who accompanied Lance during the 1993 attempt to murder Joy Lance and Butch Wood and to whom Lance made incriminating statements after the murders.

2. *Trial Court's Alleged Error*

Lance makes the alternative argument that the trial court rendered his trial counsel ineffective by denying his motion for funds for the expert testimony discussed above. We reject this claim for two independent reasons. First, as we have discussed above, denial of those funds was not improper and did not result in significant prejudice to Lance's defense. Second, we hold that this claim is barred because it was raised and rejected on direct appeal. See *Head v. Hill,* 277 Ga. 255(III), 587 S.E.2d 613 (2003). Although the focus of Lance's argument on direct appeal regarding experts was on *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), which was decided solely on the basis of due process, Lance's argument on direct appeal also invoked the Sixth Amendment. Raising this additional ground on direct appeal, rather than saving it for when new counsel began representing Lance, was appropriate, because this form of Sixth Amendment claim does not involve the potential conflict of interest inherent where a lawyer accuses himself or herself of having made unprofessional choices. See id. at 87, n. 13, 105 S.Ct. 1087 (noting, but declining to address, the possibility that a trial court's denial of expert funds might raise Sixth Amendment concerns, in addition to due process concerns, that could be considered on direct appeal); *Strickland, supra,* 466 U.S. at 686, 104 S.Ct. 2052 (noting that there are Sixth Amendment claims regarding governmental interference with the right to counsel that are distinct from claims regarding trial counsel's own deficient performance). Compare *Glover v. State,* 266 Ga. 183, 183-185(2), 465 S.E.2d 659 (1996) (holding that a claim alleging that trial counsel himself or herself acted outside of the bounds of

professional competence must be raised at the earliest practicable moment). Having been timely raised, the claim was rejected by this Court. *Lance,* supra, 275 Ga. at 13-14(2), 560 S.E.2d 663. Thus, it is now barred.

C. *Combined Effect of Trial Counsel's Deficiencies*

Above, we have commented on the prejudicial effect arising from each of trial counsel's deficiencies that we either have found to exist or have assumed to exist, and we have found each separately not to have been significantly prejudicial. Considering now the combined effect of those deficiencies, we conclude that the absence of those deficiencies would not in reasonable probability have affected the verdict at either phase of Lance's trial. Compare *Porter v. McCollum,* supra, --- U.S. ----(III), 130 S.Ct. at 453-456. See also *Holsey,* supra, 281 Ga. at 812, n. 1, 642 S.E.2d 56 (holding that the combined effect of trial counsel's deficiencies should be considered in weighing prejudice).

III. *Claims that are Barred as Previously Litigated*

Lance argues that the habeas court erred by finding certain claims to be barred by this Court's denial of those same claims on direct appeal. A habeas court should not reconsider issues previously addressed by this Court where there has been no change in the law or the facts since this Court's decision. See *Hill,* supra, 277 Ga. at 263(III), 587 S.E.2d 613 (habeas court "properly found claims previously rejected by this Court in Hill's direct appeal to be barred by res judicata"); *Bruce v. Smith,* 274 Ga. 432, 434(2), 553 S.E.2d 808 (2001) ("Without a change in the facts or the law, a habeas court will not review an issue

decided on direct appeal."). But see *Hill,* supra at 257(II)(A)(1), 587 S.E.2d 613 (noting that a claim based on new law may only serve as the basis for habeas corpus relief if the new law is of the type that is given retroactive effect). We conclude that Lance has failed to show any new law or new facts that justify the reconsideration of the claims he raised on direct appeal.

A. Lance claims that the State knowingly presented false testimony from a witness at trial, Frankie Shields. See *United States v. Agurs,* 427 U.S. 97, 103(II), 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (a conviction "obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"). At trial, Shields denied that his testimony was part of a deal with the State. While Lance's original direct appeal was pending, this Court was informed that Shields had written a letter to a newspaper claiming that there had in fact been a deal. This Court struck the original direct appeal from its docket and remanded the case for an evidentiary hearing in the trial court on the matter. At that hearing, Shields testified that there had been no deal, and this Court held on appeal from that hearing that the "evidence authorized the trial court to find that no deal had been offered to or made with Shields by the State." *Lance,* supra, 275 Ga. at 25(35), 560 S.E.2d 663. In the habeas court, Lance once again claimed that the State had made a deal for Shields's trial testimony. At the evidentiary hearing in the habeas court, Shields again admitted that he had spoken with Lance in the jail and that Lance had drawn a map of the area where the murders occurred, but Shields claimed that he had

testified falsely in the trial court about Lance's confession to him and about there being no deal with the State for his testimony. The habeas court found Lance's claim to be barred; however, in an apparent abundance of caution, the habeas court also made the reasonable finding of fact that Lance, in light of all of the evidence presented, had failed to prove that Shields's trial testimony was actually false. Similarly, we pretermit whether the evidence Lance presented in the habeas court constitutes the type of new alleged facts that could ever warrant setting aside the procedural bar to his claim, and we hold that his claim is meritless because Shields's trial testimony was not actually false.

Similarly, to the extent that Lance can be deemed to have sufficiently raised related claims regarding his intent to commit the murders and the proportionality of his death sentence, we deem those claims also to be meritless, even if they are not barred.

B. Lance claims that the trial court erred by admitting evidence of his prior conduct toward the victims and other persons. Lance has failed to show any new facts or new law that would justify this Court's revisiting its previous holding that this evidence was proper. See *Lance,* supra, 275 Ga. at 19(15), (16), and (18), 560 S.E.2d 663. Thus, this claim remains barred.

C. Lance argues in summary terms that the habeas court erred by refusing to grant relief based on other claims that were considered and rejected by this Court on direct appeal. We conclude that Lance's arguments regarding these claims are "so lacking in specific argument" that they should be deemed abandoned. See

Supreme Court Rule 22; *Hill,* supra, 277 Ga. at 269(VI)(A), 587 S.E.2d 613.

IV. *Claims that are Procedurally Defaulted*

Lance also argues in summary terms that the habeas court erred by denying various claims because they were barred by procedural default. See *Turpin v. Todd,* 268 Ga. 820(2), 493 S.E.2d 900 (1997) (addressing procedural default); OCGA § 9-14-48(d). We conclude that Lance's arguments regarding these claims are "so lacking in specific argument" that they should be deemed abandoned. See Supreme Court Rule 22; *Hill,* supra, 277 Ga. at 269, 587 S.E.2d 613(VI)(A).

V. *Remaining Claims that are Abandoned*

Lance's remaining claims, which are presented as a mere list and which are supported only by an improper attempt to incorporate arguments made in the habeas court rather than in this Court, are likewise deemed abandoned. *Hill,* supra, 277 Ga. at 269(VI)(A), 587 S.E.2d 613.

Judgment reversed in Case No. S09A1536. Judgment affirmed in Case No. S09X1538. Carley, P.J., Benham, Thompson, Hines and Melton, JJ., and Judge Gregory A. Adams, concur. Nahmias, J., disqualified.

APPENDIX B

IN THE SUPERIOR COURT OF BUTTS COUNTY STATE OF GEORGIA

CASE NO: 2003-V-490
HABEAS CORPUS

[Filed April 28, 2009]

DONNE CLEVELAND LANCE	)
	)
Petitioner,	)
	)
v.	)
	)
HILTON HALL, Warden, Georgia Diagnostic and Classification Prison,	)
	)
Respondent.	)
	)

FINAL ORDER
FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO O.C.G.A. § 9-14-49

This matter comes before this Court on the Petitioner's Amended Petition for Writ of Habeas Corpus as to his convictions and sentences of death from his trial in the Superior Court of Jackson County. Having considered the Petitioner's original and amended Petition for Writ of Habeas Corpus (the

"Amended Petition"), the Respondent's Answers to the original and amended Petitions, relevant portions of the appellate record, evidence admitted at the hearing on this matter on August 28-30, 2006, the documentary evidence submitted, the arguments of counsel, and the post-hearing briefs, the Court hereby DENIES the petition for writ of habeas corpus as to the convictions and GRANTS the writ of habeas corpus only as to the death sentences imposed and VACATES Petitioner's death sentences. This Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49.

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IN THE SUPERIOR COURT OF BUTTS COUNTY STATE OF GEORGIA

CIVIL ACTION NO. 2003-V-490
HABEAS CORPUS

[Filed April 28, 2009]

DONNE CLEVELAND LANCE,	)
	)
Petitioner,	)
	)
v.	)
	)
HILTON HALL, Warden, Georgia Diagnostic and Classification Prison,	)
	)
Respondent.	)

FINAL ORDER

I. PROCEDURAL HISTORY

On June 23, 1999, Donnie Cleveland Lance (hereinafter referred to as "Petitioner") was convicted in the Superior Court of Jackson County on two counts of malice murder, two counts of felony murder, one count of burglary and one count of possession of a firearm during the commission of a crime. Following the sentencing phase of trial, the jury returned two sentences of death against Petitioner for the murders of Sabrina Joy Lance and Dwight G. Wood, Jr. (R. 546-547). Petitioner was further sentenced to twenty years for burglary and five years for possession of a

firearm during the commission of a crime, all to be served consecutively. The felony murder convictions were vacated by operation of law.

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on February 25, 2002. Lance v. State, 275 Ga. 11 (2002). Thereafter, Petitioner filed a petition for writ of certiorari in the United States Supreme Court, which was denied on December 2, 2002. Lance v. Georgia, 537 U.S. 1050 (2002).

On May 29, 2003, Petitioner filed the above-styled habeas corpus petition challenging the convictions and sentences entered in the Superior Court of Jackson County, Georgia. A motions hearing was conducted in this case on March 19, 2004. The evidentiary hearing was held on August 28-30, 2006.

II. STATEMENT OF FACTS

The Georgia Supreme Court summarized the facts of Petitioner's case in its opinion on direct appeal as follows:

> The evidence presented at trial showed the following. The bodies of the victims were discovered in Butch Wood's home on November 9, 1997. Butch had been shot at least twice with a shotgun and Joy had been beaten to death by repeated blows to her face. Expert testimony suggested they had died earlier that day, sometime between midnight and 5:00 a.m. The door to Wood's home had imprints consistent with size 7 1/2 EE Sears "Diehard" work shoes. Joy's father testified he told appellant Joy was not at home when appellant had telephoned him

looking for Joy at 11:55 p.m. on November 8. A law enforcement officer testified he saw appellant's car leave appellant's driveway near midnight. When questioned by an investigating officer, Lance denied owning Diehard work shoes; however, a search of Lance's shop revealed an empty shoe box that had markings showing it formerly contained shoes of the same type and size as those that made the imprints on Wood's door, testimony by Sears personnel showed that Lance had purchased work shoes of the same type and size and had then exchanged them under a warranty for a new pair, and footprints inside and outside of Lance's shop matched the imprint on Butch Wood's door. Officers also retrieved from a grease pit in Lance's shop an unspent shotgun shell that matched the ammunition used in Wood's murder.

Joe Moore testified he visited Lance at his shop during the morning of November 9, 1997, before the victims' bodies were discovered. Referring to Joy, Lance told Moore that "the bitch" would not be coming to clean his house that day. Lance stated regarding Butch Wood that "his daddy could buy him out of a bunch of places, but he can't buy him out of Hell." Lance also informed Moore that Joy and Butch were dead. Moore disposed of several shotgun shells for Lance, but he later assisted law enforcement officers in retrieving them. The State also presented the testimony of two of appellant's jail mates who stated appellant had discussed his commission of the murders.

> The State also presented evidence that appellant had a long history of abuse against Joy, including kidnapping, beatings with his fist, a belt, and a handgun, strangulation, electrocution or the threat of electrocution, the threat of burning with a flammable liquid and of death by a handgun and with a chainsaw, the firing of a handgun at or near her, and other forms of physical abuse. Several witnesses testified that appellant had repeatedly threatened to kill Joy if she divorced him or was romantically involved with Butch, and that Lance had also beaten and threatened to kill Butch's wife and several other persons related to Joy. A relative of Joy testified that Lance once inquired how much it would cost to "do away with" Joy and Butch. Towana Wood, who was Butch's former wife, and Joe Moore testified about an invasion of Butch's home committed by Joe Moore and appellant in 1993. The invasion was prompted in part by appellant's belief that Butch was romantically involved with Joy. In the 1993 incident, appellant kicked in a door to the home, entered carrying a sawed-off shotgun, and loaded the chamber of the shotgun.
>
> Lance v. State, 275 Ga. 11, at 13 (2002).

III. SUMMARY OF PETITIONER'S CLAIMS

The Petition for Writ of Habeas Corpus (as amended) enumerates twenty-nine (29) claims for relief. As is stated in further detail below, the Court finds: **(1)** that some of the claims are procedurally barred due to the fact that they were litigated on direct

appeal; (2) that some of the claims are procedurally defaulted because Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; (3) that some of the claims are non-cognizable; and (4) that some of the claims are neither procedurally barred nor defaulted and are, therefore, properly before the Court for habeas review.

ABANDONED CLAIMS

To the extent Petitioner failed to brief his claims for relief or failed to present evidence in support of the claims, the Court deems those claims abandoned. Any claims made by Petitioner that are not specifically addressed by this Court are DENIED.

IV. CLAIMS BARRED BY *RES JUDICATA*

The following claims of the petition were raised and litigated adversely to Petitioner on his direct appeal to the Georgia Supreme Court in Lance v. State, 275 Ga. 11 (2002). Therefore, this Court is precluded from reviewing such claims under well-settled Georgia Supreme Court precedent. See Elrod v. Ault, 231 Ga. 750 (1974); Gunter Hickman, 256 Ga. 315 (1986); Roulain v. Martin, 266 Ga. 353 (1996).

> **The portion of Claim II** wherein Petitioner alleges that the trial court failed to provide Petitioner with the necessary assistance of competent and independent experts on the issues of time of death (pathologist) and latent footprint analysis (crime scene expert), (see Lance v. State, 275 Ga. at 13-14(2));

The portion of Claim V wherein Petitioner alleges that the State engaged in prosecutorial misconduct by failing to disclose material exculpatory information regarding a deal given to Frankie Shields and presenting false testimony[1] from Frankie Shields about possible deals, benefits, proceeds or other inducements they had received, expected to receive or did receive in exchange for such testimony. (see Lance v. State, 275 Ga. at 25-26(35)).

Claim VI, wherein Petitioner alleges that he did not kill, attempt to kill, or intend to kill Joy Lance or Dwight Wood, Jr., (Enmund v. Florida, 458 U.S. 782 (1982), (see Lance v. State, 275 Ga. at12-13(1));

Claim VIII, wherein Petitioner alleges that the prosecution improperly relied upon evidence of unadjudicated bad acts, (see Lance v. State, 275 Ga. at 19-20(15)(16) and (18));

Claim X, wherein Petitioner alleges that the trial court erroneously permitted the prosecution to introduce improper "victim impact" testimony, (see Lance v. State, 275 Ga at 24(27));

The portion of Claim XII wherein Petitioner alleges that the prosecution impermissibly

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[1] The Court notes that Shields' testimony in the instant proceeding does not establish that his trial testimony was false. The Georgia Supreme Court credits trial testimony more than post trial recantations. See Norwood v. State, 273 Ga. 352, 353 (2001).

struck a disproportionate number of jurors based on racial bias, (see Lance v. State, 275 Ga. at 17(12));

Claim XVII, wherein Petitioner alleges that his death sentences are disproportionate to sentences sought and imposed on others who have committed similar crimes, (see Lance v. State, 275 Ga. at 26-27(40));

Claim XIX, wherein Petitioner alleges that capital punishment is cruel and unusual, (see Lance v. State, 275 Ga. at 26(37));

Claim XX, wherein Petitioner alleges that the trial court erred in refusing to excuse for cause numerous potential jurors (prospective jurors Casey, Dial, Braswell and juror Witcher), who were biased against Petitioner and/or whose views regarding the death penalty would have substantially impaired their ability to fairly consider a sentence less than death and to fairly consider and give weight and meaning to all proffered mitigating evidence, (see Lance v. State, 275 Ga. at 15-17(8)(9)(11));

Claim XXI, wherein Petitioner alleges that the trial court erred in excusing for cause prospective juror (McCullers) whose views on the death penalty were not extreme enough to warrant exclusion, (see Lance v. State, 275 Ga. at 17(10)); and

Claim XXVII, wherein Petitioner alleges that Georgia's statutory aggravating circumstances as defined and applied are unconstitutionally

vague and arbitrary, (see Lance v. State, 275 Ga at 26(37)).

V. CLAIMS WHICH ARE PROCEDURALLY DEFAULTED

In his petition, Petitioner raises several claims which are procedurally defaulted due to Petitioner's failure to raise the claims on trial and on direct appeal. This Court finds that Petitioner has failed to establish cause[2] and actual prejudice or a miscarriage of justice sufficient to excuse his procedural default of the following claims. See Black v. Hardin, 255 Ga. 239 (1985); O.C.G.A. § 9-14-48(d); Hance v. Kemp, 258 Ga. 649(4)(1988).

The portion of Claim II wherein Petitioner alleges that the trial court failed to provide Petitioner with the necessary assistance of a mental health expert, a polygraph expert, and a fingerprint expert;

Claim III, wherein Petitioner alleges that his execution would be unconstitutional because he suffers from mental retardation, illnesses, and disabilities;[3]

---

[2] Petitioner has alleged that to the extent that counsel failed to raise these claims at trial or direct appeal, counsel rendered ineffective assistance of counsel in doing so. Except as set forth in Section VII.A.9 below, these claims of ineffective assistance of counsel are denied.

[3] The Court addresses this claim on the merits in Section VII.B.1 below. See Schoefied Holsey, 28 1 Ga. 809, 816-17 (2007) (holding that the habeas court was correct in considering new claim of

Claim IV, wherein Petitioner alleges that the jury committed misconduct throughout all phases of trial;

The portion of Claim V wherein the Petitioner alleges that the State engaged in misconduct by not disclosing relevant, material exculpatory files, documents and/or evidence regarding acts of misconduct by members of the jury venire, the actual jurors and/or the alternate jurors;

The portion of Claim V wherein Petitioner alleges that the State made improper arguments to the jury;

Claim VII, wherein Petitioner alleges that the prosecution suppressed material exculpatory evidence, including but not limited to, evidence of communications and meeting with certain key witnesses who testified against the Petitioner;[4]

Claim IX, wherein Petitioner alleges that the trial court erred in admitting gruesome and prejudicial photographs and videotape taken of the crime scene and the victims;

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mental retardation under the "miscarriage of justice" exception to the rule of procedural default when issue was not raised at trial).

[4] To the extent Petitioner alleges that that the State suppressed exculpatory evidence with regard to Frankie Shields, this claim was addressed and decided adversely to Petitioner on direct appeal. Lance v. State, 275 Ga. At 24 (28).

Claim XI, wherein Petitioner alleges that the grand jury and traverse jury were unconstitutionally composed and were the result of unconstitutional practices and procedures;

The portion of Claim XII wherein Petitioner alleges that the prosecution impermissibly struck a disproportionate number of jurors based on gender bias;

Claim XIII, wherein Petitioner alleges that the State destroyed and/or failed to preserve potentially exculpatory evidence;

Claim XVI, wherein Petitioner alleges that the lack of a uniform standard for seeking and imposing the death penalty across Georgia and the prosecutor's potential arbitrary abuse of discretion to seek the death penalty renders his death sentence unconstitutional;

The portion of Petitioner's Post-Hearing Brief (as it relates to **Claim XX**) wherein Petitioner alleges that the trial court improperly qualified juror Queen to serve on Petitioner's case;

Claim XXII and **Claim XXIII**, wherein Petitioner alleges that the trial court's instructions to the jury regarding reasonable doubt were unconstitutional;

Claim XXIV, wherein Petitioner alleges that the verdict form was unconstitutionally vague;

Claim XXVIII, wherein Petitioner alleges that the application of Georgia's Unified Appeal Procedure is unconstitutional; and

The portion of Petitioner's Post-Hearing Brief wherein Petitioner alleges that the trial court erred when it denied Petitioner's request for additional counsel.

With regard to the allegation in **Petitioner's Post-Hearing Brief** that the trial court erred when it denied Petitioner's request for additional counsel, the Court notes that Petitioner had *retained* the counsel of his choice for his trial. J. Richardson Brannon, Petitioner's trial counsel, was an attorney who had extensive criminal litigation experience, including capital litigation experience. (Res. Ex. 2, HT 8304-8305, 8308-8309; HT 35-36). Petitioner relies on the American Bar Association's guidelines, which recommend that two qualified attorneys be assigned to represent capital defendants, as well as Georgia's Unified Appeal Procedure, in support of this claim. The Court notes that the ABA guidelines are not "requirements" which were binding on the trial court at the time of trial, and the Unified Appeal Procedure did not become effective until after Petitioner's trial. Although the better practice would have been for the trial court to appoint second counsel to assist in the Petitioner's defense, the Court finds that Petitioner has failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

In **Claim IV** Petitioner alleges that the jury committed misconduct throughout all phases of trial, including but not limited to the following:

1) Jurors searched the Bible during deliberations;

2) Jurors violated their oaths and the trial court's instructions;

3) Jurors were tainted and/or affected by and/or relied upon outside, extraneous and/or unlawful influences, facts, factors, sources of fact and/or law, persons and officials, including religious and/or religious-related materials;

4) Jurors failed to reveal relevant and material information during voir dire, on jury questionnaires, and/or when they were questioned by the parties and/or the judge;

5) Jurors improperly considered matters extraneous to the trial;

6) Certain jurors refused to deliberate;

7) Certain jurors participated in *ex parte* deliberations;

8) Certain jurors participated in deliberations prior to the conclusion of the guilt/innocence and/or penalty phases of trial;

9) Jurors had improper biases that infected their deliberations; and

10) Jurors improperly prejudged Petitioner's case;

Petitioner argues that the jurors prayed together, consulted the Bible to justify imposing the death penalty and that there were Gideon Bibles in their hotel rooms. Petitioner failed to raise these claims at trial or on direct appeal although the alleged basis for these claims was available to trial and appellate counsel, just as it was available to habeas counsel. Petitioner's allegation rests solely on the testimony of juror Tona Harrell. Significantly, the affidavit of Tona Harrell was obtained by Petitioner on October 23, 1999, which was four months after Petitioner's trial. (HT 3494). Petitioner's appeal was docketed in the Georgia Supreme Court on December 16, 1999. Subsequently, the case was remanded for an evidentiary hearing on the issue of whether Frankie Shields was given a "deal" by the State prior to trial. After the hearing was concluded, the appeal was docketed again on August 30, 2001. See Lance, 275 Ga. at 12. Accordingly, as Petitioner was aware of the basis of this claim at the time of the April 2000 hearing in the trial court, Petitioner could have reasonably raised this claim in a motion for new trial or on direct appeal.

Georgia law is clear that claims Petitioner failed to raise on direct appeal are not reviewable by this Court as Petitioner has failed to establish the requisite cause and prejudice or a miscarriage of justice to overcome his procedural default of these claims. See, e.g., Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); O.C.G.A. § 9-14-48(d). Accordingly, Petitioner has procedurally defaulted this claim and it is barred from this Court's review. Black v. Hardin, supra.

As to prejudice, Petitioner has failed to show that the jury improperly relied on the Bible or prayer. The affidavit and deposition of Tona Harrell states that "[the jurors] also prayed together a lot and several people searched the Bible for assistance in being comfortable with our decision." (HT 1260, HT 3492). Regarding the fact that the jurors prayed together, Ms. Harrell stated:

> I don't recall any prayer to help us with the deliberation. I recall prayer because it was such an emotional task that we had ahead of us. And it was very emotional. I mean, we had a decision to make that was an important decision. And I remember – and I can't remember if it was a prayer led. I don't remember the exact details, but it was about just – it was for us. It wasn't the case. It was for us to give us comfort and to know that – you how, comfort. I mean, that's the only word I can think of to describe it to you. It was just to give us comfort.

(HT 1259-1260). She further stated that no one quoted verses from the Bible. (HT 1259).

Ms. Harrell testified that she did not search the Bible for assistance in making her decision, and she did not recall that other jurors were searching the Bible for scriptures. (HT 1260). In fact, she did not recall seeing any jurors physically looking in the Bible. (HT 1261). She explained that she prayed for "personal reasons" in that it was a "personal comfort." (HT 1258-1259). Ms. Harrell further stated that she did not pray out loud, and she could not recall any of the other jurors praying out loud. (HT 1259). Moreover, Ms. Harrell repeatedly stated in her deposition that there

was not a Bible in the jury room, and none of the jurors quoted scriptures from the Bible during their deliberations. (HT 1259, 1261).

To establish the requisite prejudice, Petitioner had to show that the jurors relied on the Bible for their sentencing decision, not merely that the jury read the Bible or prayed for personal inspiration or spiritual guidance as the facts establish in the instant case. As held by the Georgia Supreme Court in Cromartie v. State, 270 Ga. 780, 789-790 (1999), "a juror's personal use of the Bible or other religious book outside the jury room is not automatically prohibited."

Additionally, in Cromartie, the Georgia Supreme Court relied on Jones v. Kemp, 706 F.Supp. 1534, 1560 (N.D. Ga. 1989), in which the district court held, "[t]he court in no way means to suggest that jurors cannot rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen.. . ." Thus, "possession, *even in the jury room*, of personal Bibles, perhaps even consulted for personal" "inspiration or spiritual guidance" is not automatically prohibited. (Emphasis added).

Accordingly, Petitioner has failed to establish the requisite miscarriage of justice or cause and prejudice to overcome his default of this claim and it remains barred from this Court's review.

As to the remainder of Petitioner's juror misconduct claims, he has failed to support them with any evidence or argue them to this Court, thus the Court find that Petitioner has failed to establish cause and

prejudice or a miscarriage of justice to overcome his default of these claims.

With regard to the portion of **Petitioner's Post-Hearing Brief** (as it relates to **Claim V**) wherein Petitioner alleges that the State made improper arguments to the jury, the Court finds that Petitioner has failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

The Court finds that the State's argument that the past incidents of violence by Petitioner against both victims imply that he killed them was not improper. (T. 1926-28, 1929). Prior bad acts "are evidence of the relationship between the [victim and the defendant] and may show the defendant's motive, intent, and bent of mind in committing the act for which he is being tried." Graham v. State, 274 Ga. 696, 698 (2002); see also Dixon v. State, 275 Ga. 232, 233 (2002)(finding that the admission of prior violence was proper because it was "illustrative of [the defendant's] abusive course of conduct toward [the victim]"). Furthermore, this Court notes that this evidence was admitted at trial as unadjudicated prior bad acts and the admission of this evidence was upheld by the Georgia Supreme Court in Petitioner's direct appeal. See Lance v. State, 275 Ga. 11, 19 (2002). Because the State relied upon admissible evidence in making a proper deduction of motive, intent, bent of mind, or course of conduct, Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

The Court finds that the prosecution's statements that Petitioner loved to inflict pain on the victim and

that Petitioner's culpability for the murders can be implied from his own statement, "if I can't have you no one else can," were not improper. (T. 1928, 1935). Both the State and the defendant are given wide leeway during closing argument to argue all reasonable inferences that may be drawn from the evidence. Smith v. State, 279 Ga. 48, 50 (2005). An attorney may make almost any form of argument he or she desires if it is based upon the facts in the record and the deductions that may be drawn therefrom. Whether such argument is illogical, unreasonable, or even absurd, is a matter left for the reply of the adverse party, not for rebuke by the court. Morgan v. State, 267 Ga. 203, 203-204 (1996). As these arguments were reasonable inferences from the considerable evidence that came out at trial of violence, domestic abuse, and death threats that Petitioner repeatedly imposed on the victims, Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

Petitioner claims that the State commented on Petitioner's failure to waive his privilege against self-incrimination, but has provided no citation to the trial transcript in support of this claim. The Court concludes Petitioner has abandoned his attempt to establish cause and prejudice or a miscarriage of justice and has not overcome the procedural default of this claim.

Petitioner also alleges that the State's comments about mercy and deterrence were in error. (T. 1936-37, 1940). The Court finds that both of these arguments are proper. The Georgia Supreme Court has held that it is acceptable for the prosecution to argue that the defendant showed the victim no mercy. See Crowe v.

State, 265 Ga. 582, 592-593; Moon v. State, 258 Ga. 748, 760 (1988). The Georgia Supreme Court has also held that a prosecutor may vigorously argue that a death sentence is the appropriate punishment and may remind the jury of the retributive and general deterrent function of its verdict. Fleming v. State, 265 Ga. 541, 458 (1995); Ford v. State, 255 Ga. 81, 93 (1985). As such, the prosecutor's references in the instant case to Petitioner's lack of mercy and his use of the phrase, "There's only one verdict that will stop the Donnie Lances of this world," were not improper. Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

Petitioner claims that the State argued facts not in evidence; however Petitioner does not allege which facts he is challenging. Therefore, the Court concludes Petitioner has abandoned his attempt to establish cause and prejudice or a miscarriage of justice and has not overcome the procedural default of this claim.

Petitioner also claims that the prosecutor improperly offered his personal opinion during closing arguments. (T-1762-1765, 1769-72, 1773, 1776-77, 1778, 1785-86, 1790-91, 1805-06, 1807, 1808, 1810, 1813, 1814, 1823-27, and 1829). The Georgia Supreme Court has held that a prosecutor's statements, even if "couched in the framework of personal opinion," are not improper if the statements are inferences drawn from the evidence. See Carr v. State, 267 Ga. 547, 556 (1997). See also Shirley v. State, 245 Ga. 616, 617 (1980)(holding that it is not improper for a prosecutor to urge the jury to draw conclusions as to a witness' veracity from the evidence); Jackson v. State, 281 Ga. 705, 708 (2007)(finding that a "prosecutor's use of

phrases such as 'I think' and 'I know' does not amount to an impermissible statement of personal opinion"). The Court finds that some of the statements alleged by Petitioner to be opinions are actually not opinions, and the remaining statements are permissible inferences from the evidence that are merely set in the framework of a personal opinion. See Carr; 267 Ga. at 556. Thus, the Court concludes that Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

Petitioner claims that the State improperly referred to religion and/or God in the closing argument. The laws of Georgia do not forbid all references to religion in a closing argument. The Georgia Supreme Court has held, "It is not and has never been the law of Georgia that religion may play no part in the sentencing phase of a death penalty trial." Greene v. State, 266 Ga. 439, 449 (1996). "While it is improper for the prosecutor to urge the imposition of the death penalty based on Appellant's beliefs or to urge that the teachings of a particular religion mandate the imposition of that sentence, the prosecutor nevertheless may allude to such principles of divine law relating to transactions of men as may be appropriate to the case." Hill v. State, 263 Ga. 37, 46 (1993). While the Georgia Supreme Court has found error in references to religion which invite jurors to base their verdict on extraneous matters not in evidence, (id. at 45-46), the Court has distinguished these direct references from passing religious references. See Carruthers v. State, 272 Ga. 306, 309-310 (2000).

In the instant case, the State did not impermissibly invite the jurors to base their verdict on divine law or

on any extraneous matters not in evidence. During the State's closing argument, the prosecutor stated, "God does not like to see crimes like this go unpunished. ... And that unseen hand of God is what brought Donnie Lance to justice." (T. 1940-1941). When read in context, the prosecutor actually was referring to God's intervention in the discovery of incriminating evidence against Petitioner. (T. 1778, 1940). These statements did not suggest that the jury should rely on divine law in sentencing Petitioner to death.

In determining that Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his procedural default of this claim, the Court also notes that defense counsel argued at length during his closing argument that the jury should give Petitioner a lesser sentence based on the teachings of Jesus and the Christian principles of forgiveness and mercy. (T. 1945-1949). Given the fervent religious arguments against the death penalty made by Petitioner's counsel at trial, there is no error resulting from the prosecutor's two references to God's involvement in bringing Petitioner to justice. See Crowe, 265 Ga. at 593 (finding that the State's references to religion and the Bible were not error because the defendant's own mitigation evidence focused on an appeal to religion).

In a portion of **Petitioner's Post-Hearing Brief** (as it relates to **Claim V**) Petitioner alleges that the State violated his constitutional rights by not disclosing an alleged deal with Morgan Thompson (a/k/a Frank Morton). Petitioner failed to raise this allegation on direct appeal. The Court finds that the claim was available to appellate counsel just as it was available to habeas counsel, particularly in light of the

fact that habeas counsel rests this claim on the testimony of Frankie Shields, with whom appellate counsel spoke.

Further, the Court finds that Petitioner has failed to establish cause and prejudice or a miscarriage of justice with regard to this claim as Petitioner has failed to submit any admissible evidence in support of his allegation as Petitioner only introduced the hearsay testimony of Frankie Shields about statements Mr. Thompson allegedly made to Mr. Shields. (HT 426-430). The Court finds that these statements based on speculation and hearsay have no *indicia* of reliability and are not admissible evidence. (HT 426-430).

Moreover, the Court notes that the admissible evidence before it demonstrates that there was no deal with Mr. Thompson. Mr. Madison testified that there was no deal of any kind in exchange for Mr. Thompson's testimony against Petitioner. (HT 520-521). Mr. Thompson himself testified at trial that there was no deal, no promises, and no consideration offered in exchange for his testimony. (TT 1232).

For the above and foregoing reasons, the Court finds that Petitioner failed to overcome his procedural default of this claim.

In **Claim IX** Petitioner alleges that gruesome photographs and a video of the crime scene and the victims were improperly admitted into evidence. However, the admission of evidence is a matter within the sound discretion of the trial court. Baker v. State, 246 Ga. 317 (1980). This discretion extends to issues of whether the probative value of evidence is outweighed

by its tendency to unduly arouse the jury. Smith v. State, 255 Ga. 685 (1986). The Georgia Supreme Court has explained, "any evidence is relevant which tends to prove or disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or throw light upon a material issue or issues is relevant." Owens v. State, 248 Ga. 629, 630 (1981). In Owens, the Georgia Supreme Court stated that "the trial court has wide discretion in determining relevancy and materiality," and that "where the relevancy or competency is doubtful, it should be admitted, and its weight left to the determination of the jury." Id. at 630.

Moreover, the Georgia Supreme Court has long held that photographs which are relevant to an issue in the case are generally admissible even though they may be horrific and have an effect upon the jury. Ramey v. State, 250 Ga. 455, 456 (1983); Simon v. State, 253 Ga. 681 (1985); Lee v. State, 247 Ga. 411 (1981). Photographs which are material and relevant to any issue are admissible even though they are duplicative. Moses v. State, 245 Ga. 180, 187 (1980).

Unless there are some very exceptional circumstances, photographs of the deceased are generally admissible to show "the nature and extent of the wounds, the location of the body, the crime scene, the identity of victim and other material issues." Moses v. State, 244 Ga. 180, 187 (1980). "Although photographs of the victim are prejudicial to the accused, so is most of the state's pertinent testimony. The pictures may be gory, but murder is usually a gory undertaking." Id.

As the exhibits about which Petitioner complains were admissible to show the nature and extent of the wounds of the victims, the locations of their bodies, the crime and the crime scene, the trial court did not abuse its discretion in admitting these photographs. Thus, Petitioner has failed to establish cause and prejudice or a miscarriage of justice to overcome his procedural default of this claim.

In **Claims XXII and XXIII** Petitioner alleges that the trial court's instruction to the jury on reasonable doubt was unconstitutional in that it misstated the law and equated reasonable doubt with moral certainty which allegedly reduced the State's constitutionally mandated burden of proof. However, neither the United States Supreme Court nor the Georgia Supreme Court has found that the inclusion of the words "moral" and "reasonable" in a burden of proof charge violates due process by diminishing the legal standard required to convict the defendant. See Vance v. State, 262 Ga. 236, 237 (1992); Rivers v. State, 224 Ga. App. 558 (1997); Head v. Ferrell, 274 Ga. 399, 403(IV)(A); Victor v. Nebraska, 511 U.S. 1 (1994).

In Vance, the Georgia Supreme Court did note that a better charge would not include the phrase "moral and reasonable certainty." However, the Court recognized that the language "moral and reasonable certainty" is all that can be expected in a legal investigation," and held that the charge granted no reversible error when "considered in the context of the charge as a whole." Id. at 238 (citing Francis v. Franklin, 471 U.S. 307, 315 (1985)). Specifically, the Court found that "The trial court's charge as a whole repeatedly and accurately conveyed to the jury the

concept of reasonable doubt." Id. at 237. See also Marion v. State, 263 Ga. 358, 359(2) (1993); Brown v. State, 264 Ga. 48, (1995) (finding charge properly defined reasonable doubt, in reference to "moral and reasonable certainty" and did not lessen the burden of proof).

Further, in neither of the two different state court charges dealing with the concept of reasonable doubt examined by the United States Supreme Court in Victor v. Nebraska and the companion case of Sandoval v. California, 511 U.S. 1 (1994), did the United States Supreme Court find a constitutional violation despite the use of the phrase "moral certainty" in the Nebraska charge and the use of the phrase "to a moral certainty" in the California charge. Instead, the Supreme Court held that in each instance, when the entire charge was taken as a whole, the phrases were adequately explained so that reasonable doubt was properly understood. As that Court explained, "The problem in Cage [v. Louisiana, 498 U.S. 39 (1990)] was that the rest of the instruction provided insufficient context to lend meaning to the phrase." Victor v. Nebraska, 511 U.S. at 16.

In the instant case, the trial court's reference to a "moral and reasonable certainty" appeared in the context of a charge which as a whole repeatedly and accurately conveyed to the jury the concept of reasonable doubt. Thus, the reference to "moral and reasonable certainty" did not lessen the burden of proof necessary to obtain a conviction, and therefore did not violate the due process clause. Accordingly, Petitioner has failed to establish cause and prejudice or a miscarriage of justice and his claim remains defaulted.

VI. NON-COGNIZABLE CLAIMS

This Court finds that the following claims raised by Petitioner fail to allege grounds which allege a constitutional violation in the proceedings which resulted in Petitioner's conviction and sentence and therefore are non-cognizable under O.C.G.A. § 9-14-42(a).

Claim XIV: Petitioner's claim that O.C.G.A. § 17-10-38, was declared unconstitutional in Dawson v. State, 274 Ga. 327, 554 S.E.2d 137 (2001), and his death sentence is therefore null and void and may not be carried out is non-cognizable in these habeas proceedings. Alternatively, even if this claim was cognizable, this Court would find it is without merit. See Dawson supra; United States v. Chandler, 996 F.3d 1073, 1095 (11th Cir. 1993); Malloy v. South Carolina, 237 U.S. 180 (1915); Simms v. Florida, 754 So.2d 657 (2000);

Claim XV: Petitioner's claim that death by lethal injection would subject Petitioner to punishment under a law which is *ex post facto*, fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences and is non-cognizable. Alternatively, even if this claim was cognizable, this Court would find it is without merit. United States v. Chandler, 996 F2d 1073, 1095 (11th Cir. 1993);

Claim XVIII: Petitioner's claim that execution by lethal injection is cruel and unusual punishment fails to allege a substantial

violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences and is non-cognizable in these habeas proceedings. Alternatively, even if this claim was cognizable, this Court would find it is without merit. See Baze v. Rees, 128 S.Ct. 1520 (2008) and the recent holding in Alderman v. Donald, Civil Action No. 1:07-CV-1474 (N.D. Ga. May 2, 2008) (finding Georgia's method of execution constitutional);

Claim XXIX: Petitioner's claim of cumulative error. This Court finds that this claim is non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences. Alternatively, even if this claim was cognizable, this Court would find it is without merit as there is no cumulative error rule in Georgia. Head v. Taylor, 273 Ga. 69, 70 (2000);

Claim VI: Actual Innocence:

Petitioner's stand alone claim of actual innocence is non-cognizable in this habeas corpus proceeding, as the Georgia Supreme Court has held that "it is not the function of the writ of habeas corpus to determine the guilt or innocence of one accused of a crime." Deyton v. Wanzer, 240 Ga. 509, 510 (1978). Petitioner's proper avenue to assert his bare allegation of actual innocence is in the trial court by properly filing an extraordinary motion for new trial. Cf. Felker v. Turpin, 83 F.3d 1303 (11th Cir. 1996) (noting that Georgia law, unlike a number of other states, permits motions for new trial on newly discovered evidence grounds and provides

that the time for filing such motions can be extended). See also Mize v. Head, Civil Action No. 99-V-847 (death penalty habeas corpus case in Butts County in which the habeas corpus court found Petitioner's claim of actual innocence non-cognizable and Petitioner filed an extraordinary motion for new trial regarding that claim); Waldrip v. Head, Civil Action No. 98-V-139 (death penalty habeas corpus case in Butts County in which the habeas court found Petitioner's claim of actual innocence non-cognizable; application to appeal this issue was denied by Georgia Supreme Court). Thus, this claim is not reviewable by this Court as it is not a cognizable constitutional claim.

In order for Petitioner's allegation of actual innocence to be cognizable in this proceeding, it must be coupled with an allegation of constitutional error. See Schlup v. Delo, 513 U.S. 298, 321 (1995); Murray v. Carrier, 477 U.S. 478, 496 (1986); Herrera v. Collins, 506 U.S. 390, 400-401 (1993). This bedrock principle of law has not been eroded. See, e.g., Walker v. Penn, 271 Ga. 609, 612 (1999); Brownlee v. Haley, 306 F.3d 1043, 1065 (11th Cir. 2002); High v. Head, 209 F.3d 1257, 1273 (11th Cir. 2000); Lee v. Kemna, 534 U.S. 362, 405-406 (2001).

Petitioner's Post-hearing brief II(B): Petitioner also raises the issue of the State's response to the open records requests *made by habeas counsel*. However, this issue is not cognizable before this Court because it does not allege a substantial violation of Petitioner's rights "in the proceedings which resulted in [the petitioner's] conviction," O.C.G.A. § 9-14-42(a), and therefore cannot form a basis for habeas corpus relief:

VII. CLAIMS PROPERLY BEFORE THE COURT FOR HABEAS REVIEW

A. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

In Claim I and in numerous subparts to other claims, Petitioner alleges that he was denied his right to the effective assistance of counsel at all phases of his trial and appellate proceedings.[5] Because J. Richardson Brannon represented Petitioner at trial and on direct appeal, the instant proceeding is Petitioner's first opportunity to raise these claims and they are accordingly properly before the Court.

The standards for reviewing allegations of ineffective assistance of counsel are contained in the United States Supreme Court's seminal case of Strickland v. Washington, 466 U.S. 668 (1984) and its progeny. In order to establish his ineffectiveness claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense.

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[5] To the extent Petitioner failed to brief or to present evidence in support of his ineffective assistance of counsel claims, these claims are denied.

> This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. See also Wiggins v. Smith, 539 U.S. 510 (2003) (reaffirming the Strickland standard as governing ineffective assistance of counsel claims); Smith v. Francis, 253 Ga. 782, 783 (1985) (adopting the Strickland standard). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id.

In Strickland, the Court established a deferential standard of review for judging ineffective assistance claims by directing that "judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland v. Washington, 466 U.S. 668, 688 (1984).

In Burger v. Kemp, 483 U.S. 776, 780 (1987), the Court again discussed the parameters for examining Strickland's performance prong and directed that, "we address not what is prudent or appropriate, but only

what is constitutionally compelled." See Head v. Carr, 273 Ga. 613, 625 (2001) (quoting Zant v. Moon, 264 Ga. 93, 97-98(1994), relying on Burger v. Kemp, 483 U.S. 776, 780 (1987)).

Further, not only did the Strickland court establish a strong presumption in favor of effective assistance of counsel, but the Court in Strickland also instructed reviewing courts that the proper focus of a court reviewing a claim of ineffective assistance of counsel is to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. at 688. See also Adams v. State, 274 Ga. 854, 856 (2002)("strong presumption" exists in favor of finding defendant was provided with effective representation).

With reference to the prejudice prong, the Georgia Supreme Court has adopted the Strickland test which requires that to establish a dual prejudice, a petitioner "must demonstrate that 'there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' Smith, supra. See also Strickland, supra at 694." Head v. Carr, 273 Ga. 613, 616 (2001).

The Court notes that the presumption in favor of effective assistance is even greater when trial counsel is experienced and the implementation of this stronger presumption is justified in light of the experience of Petitioner's trial counsel. See Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000) (en banc).

Thus, the Court concludes that the experience of Petitioner's trial counsel warrants the greater presumption in favor of this Court finding effective assistance of counsel.

In the instant case, Brannon had been a member of the State Bar of Georgia for 21 years at the time of Petitioner's trial. (HT 8304). The record establishes that Brannon was an experienced criminal lawyer as Brannon had tried approximately two hundred cases to verdict and approximately eighty percent of those cases were criminal cases. (HT 35-36). The record also establishes that Brannon had extensive experience in the representation of capital defendants. Brannon had been involved in approximately thirteen or fourteen cases that involved a capital offense. (HT 36). Prior to Petitioner's case, Brannon had worked on four death penalty cases. (HT 36; Res. Ex. 2, HT 8308).

The Court also notes that, during his representation of Petitioner, Brannon utilized the services of three paralegals, including one paralegal, Pat Dozier, who had assisted Brannon with another death penalty case, and understood what was required in preparing both phases of a death penalty trial. (HT 39, 74, 78-80, 8333).

Trial counsel also obtained and utilized the assistance of investigator Andy Pennington. Investigator Pennington had extensive law enforcement experience and death penalty investigation experience. (T. 1616-1625; HT 78).

In addition to his own extensive criminal litigation experience, trial counsel also consulted with Michael

Mears during the course of Petitioner's case. (HT 83-84, HT 8347-8348, 8480-8497).

1) Denial of Request for Additional Counsel

Petitioner alleges that trial counsel was rendered ineffective by the trial court's denial of Brannon's request for a second attorney to assist in Petitioner's case. Specifically, Petitioner argues that at the time of Petitioner's case the American Bar Association's Guidelines (hereinafter "ABA Guidelines") and the Unified Appeal Procedure (hereinafter "UAP") "required" that two qualified attorneys be assigned to represent capital defendants. This Court finds that the ABA Guidelines are not "requirements" and these "guidelines" are not binding on this Court and were not binding on the trial court. Newland v. Hall, 527 F.3d 1162, 1207 (11th Cir. 2008). Additionally, the Unified Appeal Procedure (UAP) did not become effective until January 27, 2000, one year after Petitioner's trial. Based on its express effective date, at the time of Petitioner's trial the UAP did not mandate the appointment of additional counsel to represent Petitioner.

The Court further finds that Georgia case law does not support Petitioner's contention that additional counsel was required to be appointed as numerous death sentences have been upheld even where a defendant was represented by only one attorney. See e.g., Hammond v. State, 264 Ga. 879, 888 (1995); Gary v. State, 260 Ga. 38 (1990); Osborne v. Terry, 466 F.3d 1298, 1308 (11th Cir. 2006); Housel v. Head, 238 F.3d 1289, 1294 (11th Cir. 2001). The Court concludes that Petitioner cannot establish ineffective assistance of counsel based merely on the fact that he was

represented by one attorney. The Court finds that the Strickland standard applies to all of Petitioner's ineffective assistance of counsel claims and Petitioner bore the burden of establishing that trial counsel was deficient and Petitioner was prejudiced by trial counsel's representation with regard to all of his ineffective assistance of counsel claims.

2) **Investigation of Prior Bad Acts**

Petitioner alleges that based on the fact that trial counsel did not have co-counsel, Brannon was unable to perform a reasonable investigation of Petitioner's prior bad acts and that Petitioner was thereby prejudiced. The Court finds that Petitioner has failed to establish that trial counsel's representation was deficient due to trial counsel not obtaining additional counsel and has also failed to establish the requisite prejudice under Strickland with regard to this allegation.

The record establishes that trial counsel filed a Motion for Notice of Intent to Use Evidence of Other Crimes on March 31, 1998. (R. 142-144). On June 24, 1998, one year prior to trial, the State filed its notice of intent to introduce evidence of prior difficulties. (R. 211-215). On June 29, 1998, the State also filed its Notice of Intent to Introduce Evidence of Similar Transactions, which also set forth the specific factual instances the State was seeking to introduce and the witnesses that would testify with regard to these similar transactions. (R. 220-223). Following the filing of the State's notice, the trial court held an extensive hearing on the similar transactions evidence. (8/25/98 Similar Transaction Hearing; 9/28/98 Similar Transaction Hearing Continued). During that hearing,

the State presented the testimony of 17 witnesses all of whom were cross examined by trial counsel. Id.

The trial court also conducted extensive hearings on the evidence of prior difficulties. (See 9/28/98 Pretrial Hearing; 9/29/98 Pretrial Hearing; 10/2/98 Pretrial Hearing and 11/9/98 Pretrial Hearing). During the hearings, the State presented the testimony of 30 witnesses. Id. The hearing transcripts reveal that trial counsel conducted a cross examination of 28 of the 30 witnesses. Id.

Following the prior difficulties hearings, the State submitted a letter to the trial court wherein it provided detailed information regarding each prior difficulty, including the factual allegations of the prior difficulties and the witnesses that the State would be presenting to testify about the prior difficulty. (R. 336-341). On November 9, 1998, the trial court entered an order regarding both the prior difficulties and similar transactions. (R. 360-373).

Trial counsel testified that, after learning that the State was going to present this evidence at trial, he spoke with Petitioner's family with whom he had excellent and continuous rapport regarding the circumstances surrounding the prior incidents. (HT 75, 96, 8333). Trial counsel also spoke with Jim Whitmer, who had previously represented Petitioner regarding Petitioner's prior criminal cases which the State was noticing its intent to introduce, and obtained Mr. Whitmer's files regarding his representation of Petitioner with regard to those cases. (HT 95-96, 8328-8329, 8540-9000, 10783). Trial counsel also obtained medical records that document the injuries sustained by Joy Lance with regard to one of the prior

similar transactions in which Joy Lance was "pistol whipped" by Petitioner, (HT 9450-9480), and counsel maintained a file on the prior difficulties that the State noticed they were seeking to introduce that included research and an index of the prior difficulties. (HT 9481-9505, 9506-9539).

On December 1, 1998, trial counsel filed a Motion to Appoint Additional Counsel, thirteen months after Brannon assumed representation of Petitioner and six months prior to Petitioner's capital trial. (R. 391-394; HT 42, 5233-5236). Billing records establish that trial counsel had conducted extensive investigation and preparation in Petitioner's case prior to requesting the appointment of additional counsel. (HT 10772-10790). Specifically, trial counsel had conducted numerous interviews with Petitioner and his family and other witnesses, drafted pleadings, performed legal research, reviewed crime lab and autopsy reports, visited the crime scene, listened to various tapes, visited Petitioner's shop and took photographs, and reviewed and made copies of the District Attorney's file. Id.

In denying trial counsel's motion for the appointment of additional counsel, the trial court held that "there is no right, even in a death penalty case, to the appointment of two counsel to represent the defendant." (R. 412-414). The trial court further noted:

> While the court is cognizant of the complexity of any death penalty trial, the court notes that counsel for the defendant has opted into the reciprocal discovery provisions of the Georgia criminal procedure code and the state began compliance with those provisions on or about April 2, 1998, and continues to serve defense

> counsel as required with discovery materials as they are made known to the state. In addition, the state has an 'open file policy' in this case which affords the defense access to the entire contents of the state's file. The defendant has had the services of his counsel since before indictment; counsel has had an opportunity for more than one year to discover the facts of this case. Counsel for the defendant has tried death penalty cases in the past and is familiar with the current state of the law on the subject, as evidenced by the motions filed in this case and his able and eloquent arguments thereon. The relative complexity of the similar transactions and prior occurrences have all been simplified by the court's conducting hearings thereon giving counsel an opportunity not only to discover the facts of those alleged occurrences but also to place the witnesses on cross-examination prior to trial and to 'lock in' their remembrance of these events. The conduct months before trial of motions to suppress and to determine the voluntariness of defendant's statements under Jackson v. Denno gives defense counsel ample time prior to trial to prepare to meet this evidence.

(R. 413-414).

In denying Petitioner's motion for reconsideration, the trial court held that "there's been no specific showing of need." (6/3/99 Pretrial Hearing, p. 16). This Court finds that the bulk of investigation and preparation for trial had already been conducted prior to the filing of the motion for the appointment of additional counsel.

In the proceedings before this Court, Brannon testified that he was a dedicated and motivated advocate for Petitioner. Brannon described himself as a mad dog fighting meaning, "When I'm on something and I get started, I don't want to stop. And so I'll keep going for hours and hours when other people won't. And if I know there's a witness out there we may can find, I've stayed up all night to get the witness and get them under subpoena." (HT 114). Brannon further clarified that, "I just mean that that's my approach to it is this is serious business. Somebody's life's at stake." (HT 114). Therefore, Brannon's persistence and acknowledgment of the serious nature of representing a capital defendant is clearly significant in this Court's review of his performance and belies any assertion that the quality of Brannon's representation was impacted by the denial of his motion for additional counsel.

This Court finds that Petitioner has failed to establish the deficient performance of trial counsel based on Petitioner's contention that counsel was allegedly unable to investigate Petitioner's numerous bad acts prior to trial. This claim is therefore DENIED.

3) **Representation at Guilt Phase and Strategy**

Strickland instructs that with regard to trial counsel's obligation concerning making investigatory efforts, that an attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. 668. The "correct approach toward investigation reflects the reality that

lawyers do not enjoy the benefit of endless time, energy or financial resources." Rogers v. Zant, 13 F.3d 384, 387 (11th Cir. 1994). The Court finds that a review of the totality of the circumstances in the record before this Court shows that trial counsel's investigation of the guilt phase of Petitioner's case was reasonable and did not constitute deficient performance.

Brannon testified that he worked "nonstop day and night on the guilt/innocence phase" of Petitioner's case. (HT 45). In investigating the guilt phase, trial counsel engaged in numerous conversations with Petitioner regarding the specific facts of the case and Petitioner's alibi. (HT 8326-8327, 10772-10790). Trial counsel also spoke with Petitioner's family members and other witnesses. (HT 10772-10790). In addition to interviewing witnesses, counsel visited the crime scene wherein he took photographs and measurements, and he examined the various places that were struck by the fired projectiles. (HT 67-68, 108, 8344-8345, 10785). Counsel also traveled to Petitioner's shop on three separate occasions and took photographs, (HT 10782-10783), reviewed the Georgia Bureau of Investigation file and was permitted access to the State's file. (HT 108, 110, 10774, 10787).

Trial counsel also employed the services of Investigator Pennington to assist in the investigation of Petitioner's case. Investigator Pennington's billing records reflect that he spent a considerable amount of time locating and interviewing witnesses and trial counsel's testimony confirms that Investigator Pennington was responsible for interviewing witnesses. (R. 554-555; HT 52-53). Trial counsel further testified that Investigator Pennington

continued to investigate and follow up on leads during the trial. (HT 77, 115-116).

In support of his theory that Petitioner was innocent, trial counsel presented the testimony of nine witnesses during the guilt phase of Petitioner's trial. Time of death was an issue for the defense as Petitioner was with several individuals for a large portion of November 8-9, 1997, the time period when the crime occurred. The State presented evidence that the time of death occurred, approximately, between midnight on November 8, 1997 and 5:00 a.m. on November 9, 1997. (T. 1472). Accordingly, trial counsel attempted to establish an alibi defense with a number of witnesses based on the time of death and Petitioner's whereabouts.

In support of Petitioner's alibi defense, trial counsel presented the testimony of Petitioner's uncle, Raymond Lance. Petitioner's uncle testified that he was with Petitioner from 7:00 p.m. to 11:30 p.m. on November 8, 1997 at the home of Gary Whitlock. (T. 1512-1514). Around 11:30 p.m., Petitioner initially went home, but then went to his uncle's residence where they talked and drank alcohol until 5:00 a.m. Id. At 5:00 a.m., Petitioner left his uncle's residence and returned home. (T. 1517). Petitioner's uncle then saw Petitioner the following day around 2:30 or 3:00 p.m., when Petitioner and Joe Moore, visited Gary Whitlock's residence. (T. 1518). The two men stayed for only a few minutes. (T. 1518). As far as Petitioner's demeanor on the day of the murder, the uncle testified that Petitioner acted normal. (T. 1519).

In an attempt to elicit further information about Petitioner's whereabouts on the day of the crime, trial

counsel presented the testimony of Gary Whitlock. Mr. Whitlock, who was Raymond Lance's son-in-law, testified that Petitioner was at his residence on Saturday from 7:00 p.m. until 11:30 p.m. (T. 1586-1587). During that period of time, Petitioner, Marty Lance and Tony Whitlock went to the package store to purchase beer. (T. 1587-1588). Mr. Whitlock stated that the package store's location was away from the residence of Butch Wood, and that they were gone about thirty-five to forty minutes. (T. 1588).

Mr. Whitlock stated that, the following day (November 9, 1997), he saw Petitioner and Joe Moore at his residence around 1:00 p.m., and that they only stayed for about ten or fifteen minutes. (T. 1589-1590). Regarding Petitioner's demeanor, Mr. Whitlock testified that he acted normal. (T. 1590).

Trial counsel then presented the testimony of Walter Tonge who owned the Country Corner package store. (T. 1596). Mr. Tonge testified that he saw Petitioner and others on Saturday between 8:00 p.m. and 10:00 p.m. (T. 1596-1597). Mr. Tonge stated that Petitioner was only inside the store for a few minutes. (T. 1597).

Trial counsel also presented the testimony of Marty Lance who testified that he saw Petitioner at Petitioner's shop on November 8, 1997 around 6:00 p.m., and that he stayed with Petitioner for about forty-five minutes to an hour. (T. 1599-1600). During that time period, Marty Lance did not notice anything unusual about Petitioner's behavior. (T. 1600).

Marty Lance also saw Petitioner later that night at Gary Whitlock's house, and he again did not notice

anything unusual about Petitioner's behavior. (T. 1601, 1603). Specifically, he stated that he arrived at Mr. Whitlock's house around 7:15 or 7:20 p.m., and he stayed until 11:00 p.m. Id. Marty Lance testified that, during the time at Mr. Whitlock's house, Petitioner and Tony Whitlock left and purchased beer at Walter Tonge's package store. (T. 1602). He estimated that they left around 8:00 p.m., and they were only gone about fifteen or twenty minutes. Id. He did not see Petitioner again until the Monday after the crime. Id.

Trial counsel presented the testimony of Matthew and Will Skinner, two children who lived next door to Butch Wood, who offered testimony that they heard gunshots and a scream on Sunday, November 9, 1997, sometime after lunch. (T. 1499-1500, 1508). Matthew Skinner testified that after the gunshots, he observed a man leaving the residence with what appeared to be a pistol in his hand and drive away in a red Camaro. (T. 1501-1502).

Trial counsel also presented the testimony of Petitioner's father Jimmy Lance to attempt to rebut the prior difficulties between Petitioner and Joy Lance. Regarding the incident wherein Petitioner attempted to electrocute Joy, Petitioner's father testified that they were fighting because Joy was having an affair. (T. 1547). When he arrived at Petitioner's shop, Petitioner and Joy had stopped fighting. (T. 1547-1548). Petitioner's father testified that Petitioner did not hit Joy during that fight; however, he did observe blood on Joy's nose. (T. 1548). He further denied that Petitioner had attempted to electrocute Joy during that incident. (T. 1546, 1548). Regarding another incident of violence between Petitioner and Joy, Petitioner's father testified that Petitioner never

attempted to set Joy's hair on fire by spraying WD-40 on her. (T. 1548-1549).

Regarding the crime, Petitioner's father testified that he did not recall going to Petitioner's shop on the day of the crime; however, he saw Petitioner "come up and down the road and go in his driveway." (T. 1553). On the day after the crime, he saw Petitioner around lunchtime. (T. 1553-1554). In an attempt to rebut the State's evidence that Petitioner's father assisted Petitioner in obtaining alibi statements the day after the crime, trial counsel had Petitioner's father deny the allegations that he assisted Petitioner in obtaining alibi statements from various individuals in that he did not know about the murders until it was reported on the news. (T. 1554).

Regarding Petitioner's firearms, Petitioner's father testified that he removed all of Petitioner's firearms from his residence after Petitioner was sent to boot camp as Petitioner was not allowed to have any firearms. (T. 1556). Petitioner also had a sawed off shotgun that was given to Gary Watson, which was subsequently recovered by the police, (T. 1557-1558). With regard to the red Camaro the Skinner boys testified they saw, Petitioner's father stated that Petitioner owned a white Monte Carlo, a white Chevy S-10 and a blue Chevrolet Caprice. (T. 1559-1560).

Gary Watson, who had known Petitioner for about thirty years, testified that Petitioner normally wore black, low-cut work shoes. (T. 1577). He also observed Petitioner wearing suede-like brown shoes. Id. Mr. Watson also testified that he had possession of Petitioner's sawed-off shotgun, until it was recovered from the police. (T. 1577-1579). Mr. Watson also

testified that the .22 rifle recovered by the police at Petitioner's shop was likely his rifle as he had taken it up to Petitioner's shop to shoot squirrels that were tearing the insulation out of the ceiling. (T. 1579-1581).

The final witness presented during the guilt phase was the defense investigator Andy Pennington. Mr. Pennington testified at trial as an expert crime scene technician. (T. 1637-1638). Trial counsel elicited testimony from Investigator Pennington as to the alleged flaws in the investigation performed by the State. Regarding the handling of the crime scene area, he testified that the investigators failed to maintain a log of who entered and exited the crime scene. (T. 1650). He also testified that the State investigators should have obtained measurements from the projectile hole through the blind in the window as it would have provided them with the caliber of the weapon, and they could have then verified "to see if it was one of the shotgun pellets or it was from another weapon." (T. 1650-1652). Based upon the number of projectile holes, Investigator Pennington opined that there could have been more than one weapon used in the crime. (T. 1651).

Additionally, Investigator Pennington testified that the photographs depicting projectile holes through the trailer were indicative of the possibility that more than one type of firearm had been discharged inside the trailer. (T. 1652-1654). Investigator Pennington further testified that the fact that Butch Wood had gunpowder residue on his right palm was also indicative of the possibility that more than one weapon was used during the crime. (T. 1654).

As to the semi-moist dirt area surrounding the trailer, Investigator Pennington testified that it would be very difficult for a person to walk into the house without leaving a footprint. (T. 1654-1655). He stated that a person would likely "leave tracks all the way up to the steps and on to the deck itself." (T. 1656-1657). Regarding Petitioner's Diehard shoe, Investigator Pennington testified that it had a "very distinctive" sole that would have left a clear mark in the semi-moist dirt area. (T. 1657). Investigator Pennington further testified that the shoe print found on the door should have been visible with the naked eye in that there should have been "some kind of marking on the door or some kind of scuff or kick mark or dent or something on the door." (T. 1657-1458).

Trial counsel then questioned Investigator Pennington as to the significance in not finding any latent prints on the shotgun shell hulls located on the floor inside the trailer. Investigator Pennington testified that he would expect to find a latent print on the shotgun shell hulls as that is a good surface for obtaining latent prints, and he stated that the person loading the weapon would have to handle the ammunition unless they were wearing gloves. (T. 1658). Based upon his experience, he believed that the fact that no latent prints were located was indicative of a good burglar who would have wiped down anything that was touched. (T. 1659).

Investigator Pennington then provided testimony regarding the time of death of the victims. Specifically, he testified that heat would "acceleratey" rigor mortis whereas cold would "retard it." (T. 1662). As there are a number of variables involved in establishing time of death, Investigator Pennington stated that "no expert

has ever been able to pin down the time of death." (T. 1662-1663).

During his guilt phase closing arguments to the jury, trial counsel stressed to the jury that Petitioner enjoyed the presumption of innocence until he was proven beyond a reasonable doubt by the State that Petitioner committed the crime. (T. 1724-1726). Counsel asked the jury to approach Petitioner's case as if it was a friend that was on trial in that they should look at "every single piece of evidence" to determine whether or not it proved what it should have proven. (T. 1726).

In reviewing the evidence that was presented during the guilt phase, trial counsel admitted to the jury that there were occasions wherein Petitioner would become angry and upset; however, that was explained by the fact that Petitioner was "a man submerged in a relationship with a crank addict who was having an affair." (T. 1729). However, trial counsel argued that, on the day of the crime, Petitioner was not agitated and "showed no signs of somebody who was going out to do some dastardly double murder" when he spoke with Jack Love around midnight. (T. 1728-1730).

Regarding the Diehard shoe print on the door, trial counsel stated that he was unable to determine whether or not there was actually a shoe print on the door. (T. 1730-1731). Counsel further stated that the investigators were unable to "see and couldn't take a gel impression" of the shoe print. (T. 1732). In addition, trial counsel stated that he was able to elicit during cross-examination evidence that the various crime scene investigators were in disagreement about

certain issues. (T. 1731). In addition, counsel noted that the State did not have any fiber, hair or blood evidence. (T. 1732-1733).

In further attacking the State's case based upon the lack of evidence, trial counsel argued that the State did not have the murder weapon. (T. 1734-1735). Counsel also attacked the State investigators for not locating the shotgun shells in the oil pit, and he argued that Joe Moore, not Petitioner, was the one who threw the shotgun shells away in a blue rag. (T. 1735-1736, 1739).

Trial counsel then argued to the jury that the State "targeted" Petitioner as they had knowledge of the "past disputes between Donnie Lance and Joy Lance." (T. 1737, 1741). He asserted that the State "didn't ever turn their head and look anywhere else." (T. 1737). In arguing to the jury the possibility that Joe Moore was responsible for the crime, counsel stated that the prosecution failed to present "one single soul" who could "cover the time period that Joe Moore would need covered on an alibi." (T. 1737-1738). In addition, counsel argued to the jury that the prosecution misled them in presenting testimony that Mr. Moore wore a size nine shoe based upon the fact that they had not measured his foot. (T. 1738).

Additionally, trial counsel reminded the jury of the testimony of Will and Matt Skinner. Specifically, trial counsel stated that both Will and Matt provided testimony that they heard shots fired around noon, and they then observed a car leaving the scene at a high rate of speed. (T. 1740). Will Skinner also testified that he saw someone get into the car with what appeared to be a pistol. Id. In questioning why

the State did not pursue Will and Matt Skinner, trial counsel asserted that it did not "fit their time of death." (T. 1741). In an attempt to persuade the jury into believing the testimony of Will and Matt, counsel argued that "[c]hildren never tell a lie. If a child says it happened this way, surely it did." Id.

In requesting that the jury not allow the testimony of prior difficulties to prejudice them, trial counsel reminded the jury that Petitioner was on trial for murder not domestic violence. Id. Trial counsel also asked the jury to review their notes on the prior difficulties to determine "how many you actually had a single person testify to that actually saw anything, and it's going to get down to one or two." (T. 1745). Counsel further stated, "[y]ou look at the others and make your decision. But do you remember each time I asked who was there, who saw it? Usually nobody. Who said it? Joy." (T. 1747).

Regarding Petitioner's confession to Frankie Shields and Frank Morton, trial counsel stated that Petitioner was a quiet person who would not talk about fighting with his wife. (T. 1750). He also stated that the police failed to tape-record the interviews with the jailhouse snitches, and he suggested to the jury that the snitches must have received a deal from the State in exchange for their testimony. (T. 1750-1751).

In concluding his argument to the jury, trial counsel summarized the evidence that was presented by the defense as to Petitioner's whereabouts around the time of the crime. (T. 1752-1754). He also reminded the jury that the time of death was important, and that there were a number of factors

that would have affected a determination as to the time of death. (T. 1754-1756).

Petitioner bore the heavy burden of establishing deficiency and prejudice. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Based on counsel's investigation of Petitioner's guilt and the presentation of evidence at trial, the Court finds that Petitioner has failed to establish deficient performance as required by Strickland as to his contentions of ineffective assistance as to guilt phase investigation and presentation of evidence in the guilt phase.

Further, the Court finds that Petitioner has failed to establish prejudice as trial counsel presented a cohesive defense strategy, supported by a number of witnesses. Also of significance with regard to this Court's review of the prejudice prong, are the facts that established that there had been ongoing domestic disputes between Petitioner and the victim, Petitioner had made previous death threats to the two victims, Petitioner had committed a similar crime by kicking in the door of Mr. Wood's trailer, Petitioner knew his children were not at the trailer on the night of the murders, the shotgun shells at the scene matched shells owned by Petitioner, Petitioner had been seen wearing shoes of the same type and size as the shoeprint on the door of the trailer, Petitioner still had the shoebox in his possession, the State had a receipt for these shoes where Petitioner had purchased them, Petitioner had been seen with a sawed-off shotgun prior to the murders, the evidence from the crime scene established that robbery/burglary was not a

motive, Petitioner's shoes, gun and clothes were missing and trash smoldering at his house when arrested, Petitioner made statements about the victims' deaths before the bodies were discovered, and Petitioner confessed to other individuals. Based on the totality of the circumstances and the record before the Court, Petitioner has failed to establish the prejudice prong of Strickland and this claim of ineffective assistance of counsel is DENIED.

4) Requesting Non-Mental Health Experts

Under applicable Georgia case law, motions for the appointment of defense experts made on behalf of indigent defendants should disclose to the trial court with reasonable precision "why certain evidence is critical, what type of scientific testimony is needed, what that expert proposes to do regarding the evidence, and the anticipated costs for services." Thomason v. State, 268 Ga. 298, 310 (1997).

Georgia law places the decision concerning whether to appoint defense experts within the discretion of the trial court, by holding that the "Authority to grant or deny a criminal defendant's motion for the appointment of an expert witness rests with the sound discretion of the trial court, and, absent abuse of that discretion, the trial court's ruling will be upheld." Crawford v. State, 267 Ga. 881(2) (1997). Georgia case law also provides that this discretion also extends to the trial court's grant or denial for a motion for assistance of other investigative services. Crawford v. State, 257 Ga. 681 (1987).

During a pretrial hearing Petitioner requested that in addition to funds he had already received, that the

trial court grant additional funds to hire: (1) an expert to assist in jury selection; (2) a forensic psychology expert; (3) a DNA expert; (4) a firearms expert; and (5) a criminoiogist. (12/3/1998 Pretrial Hearing, p. 6-11). The trial court denied Petitioner's request for the appointment of experts. (HT 5426). In denying Petitioner's trial counsel's request for various forensic experts, the trial court found the following:

> While the cause of the deaths, the time of the deaths, the blood types found at the scene, and the shoe prints found at the scene may be important in this case, the defense has presented the court with only bare allegations of need; there is no evidence of need for the forensic experts. There is no mention that the state's experts have incorrectly or enoneously reached conclusions about their findings or made misrepresentations of any reports or evidence. There is not even an unsubstantiated allegation, much less documentation, in any of the requests for experts that any of the state's experts are biased or inept, that they reached erroneous conclusions, or that the opinions of any of the proffered experts would differ from the opinions of the state's experts. The motions, the argument heard at the *ex parte* hearing, and the curriculum vitae of the experts all fail to show the court either that material assistance would be provided to the defense by the experts or that without the assistance of these experts the defendant would receive a fundamentally unfair trial.

(HT 5426-5428).

On direct appeal, the Georgia Supreme Court found no abuse of discretion as to the trial court's denial of trial counsel's requests for funds for experts based on the trial court's finding that, "the requested funds were not necessary to a fair trial." Lance v. State, 275 Ga. 11, 14 (2002).

Brannon testified at the state habeas corpus hearing that he tried to be as specific as possible in his attempt to obtain the requested experts. Brannon testified, "I tried to point out what the fees were, why their testimony would be critical in the case, based on what I knew about the case at the time." (HT 125).

As the United States Supreme Court recognized in Ake v. Oklahoma, 470 U.S. 68 (1985), there is no requirement that indigent defendants be provided all of the assistance available to non-indigent defendants. Similarly, "Equal protection doctrine does not require that an indigent defendant be provided with funds for expert assistance simply because the state is assisted by experts." Isaacs v. State, 259 Ga. 717, 725 (1989).

Additionally, the Eleventh Circuit has noted that, "the Supreme Court has not yet extended Ake to non-psychiatric experts." Conklin v. Schofield, 366 F.3d 1191, 1206 (11th Cir. Ga. 2004). Therefore, the trial court had no obligation under Ake to appoint non-psychiatric experts for the defense, regardless of the showing trial counsel made to the trial court in support of his request for expert assistance.

The Court finds that Petitioner has not established that trial counsel's performance was deficient in seeking the assistance of these experts or prejudice

from trial counsel's representation in requesting these experts. Accordingly, this claim is DENIED.

5) Not Utilizing a Crime Scene Expert

Petitioner claims that trial counsel was ineffective because he should have hired and presented testimony of a crime scene expert to attempt to rebut the evidence of the lack of any other Diehard shoeprints at the crime scene, to criticize how the crime scene was processed, and to testify that the perpetrator would have blood spatter on him. (HT 127).

It is critical, under Strickland, to place this ineffectiveness claim in the context of trial counsel's position at the time of trial. Strickland, 466 U.S. at 688. Brannon did view the crime scene, which was a trailer, but he was the only person for the defense who was able to do so, as the crime scene was not maintained since the trailer was sold. (HT 62; 67). In this regard, Brannon testified as to the limited assistance that any crime scene expert would be, stating, "And even if he [the trial judge] had given me experts, we couldn't have gotten to the crime scene because it was sold, which I felt like it certainly should have been maintained." (HT 62).

Additionally, as Brannon testified before this Court, there was very little physical evidence obtained from the crime scene, as there were no fingerprints of Petitioner found at the crime scene (HT 61); there was no DNA of Petitioner's found at the scene (HT 60); there was no hair or blood of Petitioner found at the scene (HT 60); and there were no shotgun shells of Petitioner's that were linked to the scene. (HT 60). Brannon stated that there was only one shoeprint

found at the scene, and that was an "invisible" footprint on the door, (HT 61), and that there were no footprints coming up the steps. (HT 59).

Additionally, trial counsel argued in his closing:

> Why is there not one smidgen of red clay on the steps – on the wooden steps? Why is there not one smidgen of red clay on the platform before you walk through the white door? Why? Why didn't they get down and blue light everything? They could have gotten him coming all the way up the steps if they can take it off the door. Don't be fooled by this. This is really significant. How did the people get into the house, whoever did it?

(T. 1732). Trial counsel minimized the importance of the Diehard shoebox found at the Petitioner's shop by asserting,

> The shoebox that Donnie had, they didn't find until later on. Why didn't he just throw it away? They're out there; they're casting Diehard prints; they're asking Donnie questions. Why didn't he go down to his house in a hurry and get the Diehard shoebox and burn it in that trash can where they say he must have burned some bloody clothes? Why not? It's a piece of evidence for a mastermind who knows how to kill two people, slip out of the house, and not leave a footprint and not leave a palm print and not leave a fingerprint, not leave a thing. Why wouldn't he get rid of the box? It's reasonable doubt.

(T. 1738-1739).

Most significantly, trial counsel did not need to hire a crime scene expert when such testimony would have been cumulative of the testimony given by State's witnesses and the testimony of Investigator Pennington, who testified as the defense expert at trial. Defense Investigator Pennington was authorized by the trial court to testify as a crime scene expert at trial. (T. 1636). Investigator Pennington testified concerning the proper processing of a crime scene (T. 1637-1644), and was qualified to testify and investigate the crime scene (T. 1621-1622, 1631). Additionally, Investigator Pennington was well-informed on the facts of Petitioner's case as he had assisted in the investigation of all aspects of the case and was able to counter the State's evidence on various crime scene issues. Therefore, there was no need for trial counsel to hire and expend funds for an additional forensic investigations consultant.

In contrast to the State's evidence, Investigator Pennington testified on behalf of the defense about: the need to keep the crime scene pristine; processing a crime scene; collecting evidence; testing evidence; wearing latex gloves; criticizing procedures that were not taken by Agent Cooper when the scene was being processed; the possibility of more than one weapon being fired; the probability of shoe prints in the mud or of mud being tracked onto the deck; multiple variables that need to be considered to determine time of death; and the concept of rigor mortis. (T. 1638-1666).

Also, Brannon cross-examined the State's experts on various issues relating to crime scene issues and in fact, the concessions that he obtained on

cross-examination could easily have been perceived as more important by the jury than presenting his own experts. For example, trial counsel elicited from State's witness Agent Cooper on cross-examination that there was mud surrounding the crime scene, no mud on the door at the crime scene, only one Diehard shoeprint on the door at the crime scene, compared with the mud surrounding the Petitioner's shop and the number of Diehard shoeprints found at the shop location. (T. 931-939).

The Court finds that the expert opinions Petitioner presented in these habeas proceedings with regard to the crime scene and processing thereof are, in large part, cumulative of the testimony given at trial. Therefore, the fact that trial counsel did not hire another forensic investigations consultant to present testimony and/or evidence as to these issues does not meet Petitioner's burden of establishing deficient performance by trial counsel or prejudice. See DeYoung v. State, 268 Ga. 780, 786 (5) (1997); Osborne v. Terry, 466 F.3d 1310-1311 (11th Cir. 2006) ("The fact that present counsel might have chosen to try to undermine the State's experts with defense experts does not render trial counsel ineffective or unreasonable in attempting to support his chosen defenses of self-defense or voluntary manslaughter as trial defenses, based on Osborne's own statements.")).

As to Petitioner's claim that the suggestion of a second perpetrator should have been investigated (HT 139-142), even. though, the ballistic tests confirmed that the two cartridges found at the crime scene were fired by the same weapon, (HT 157), the possibility of a second perpetrator was raised by the defense at trial. Trial counsel was not deficient as he questioned how

the "people" got into the house during his closing (T. 1732), thoroughly cross-examined Joe Moore on his possible involvement in this crime and questioned Mr. Moore's alibi during his closing argument. (T. 1080-1131; 1737-1738). The Court also finds that Petitioner has failed to show that there was a reasonable probability that the outcome of the trial would have been different if testimony such as that provided by Petitioner's habeas crime scene expert had been given. This claim is DENIED.

6) Not Utilizing a Forensic Pathologist

At the hearing before this Court, Petitioner offered the affidavit of Dr. Jonathan L. Arden in support of his claim that trial counsel was deficient and Petitioner prejudiced by the trial court denying trial counsel's motion to have a forensic pathologist appointed for Petitioner's case. (See 12/3/98 Ex Parte Hearing, p. 9; Pet. Ex. 1). Petitioner asserts that an expert like Dr. Arden could have provided testimony concerning time of death, the likelihood of blood on the perpetrator or the weapon, an explanation as to why no weapon was found, and an explanation of mistakes allegedly made by the State crime scene investigators. The Court finds that Dr. Arden's affidavit does not dispute the conclusions reached by the State's medical examiner, Dr. Frederick Hellman, given during his trial testimony concerning the time of the victim's death. Instead, a comparison of Dr. Hellman's trial testimony with the conclusions reached by Dr. Arden in his affidavit shows that they both agreed that the time of death could have possibly occurred after 5 a.m. (See T. 1471). Dr. Arden simply gives his opinion that the window of time when the death could have occurred was longer than the window of time testified to by Dr.

Hellman. However, Dr. Hellman admitted on cross-examination that he could not exclude the possibility of the deaths occurring later than 5:00 a.m. (T. 1472). Brannon thoroughly cross-examined Dr. Hellman about his conclusions on the time of death. (T. 1473-1494).

In his closing argument, Brannon argued all of the variables that go into determining time of death and stressed that the time of death could be sometime after 7:00 a.m. until as late, as sometime after lunch on Sunday, which time was consistent with the alibi defense. (T. 1754-1756).

Additionally, trial counsel offered testimony about the inability of experts to pinpoint time of death, from his own witness, Investigator Pennington. Investigator Pennington testified, "My understanding is that no expert has ever been able to pin down the time of death, that it's - - they call it, like, still in the dark ages as trying to figure out the time of death. It's like the pathologist testified, that everything I've read is exactly as he says. Everything I've been taught is exactly what he was saying. You can't pin it down." (T. 1663).

The record shows that trial counsel cross-examined the medical examiner about the important testimony given concerning time of death and used his own expert witness to testify about the difficulty in pinpointing the time of death.

As to alleged errors made the State crime scene investigators, as set forth above, trial counsel elicited testimony from Investigator Pennington as to the

alleged flaws in the investigation performed by the State. (T. 1650-1654).

Petitioner alleges that trial counsel was ineffective in failing to use an expert to establish the defense theory that the perpetrator would have inevitably had blood transferred to him in light of the large amount of blood generated due to the cause of death of Joy Lance.

The blood stain pattern analysis expert, Jerry Findley, testified at trial that there was blood spatter almost all the way around the victim, Joy Lance, and it radiated out virtually 360 degrees from the victim's head. (T. 1702). Mr. Findley further elaborated about cast-off stains going in different directions, casting off stains from the instrument itself, the direction of the instrument, and the location of the perpetrator. (T. 1702-1703). A layperson could easily conclude from this testimony that the perpetrator would have some blood spatter on him based on Mr. Findley's trial testimony and the crime scene photos. Most significantly, however, Brannon used the absence of blood on Petitioner, his clothing and in his car, to argue that the State had not proven that he was the perpetrator. (T. 759).

The Court finds that Petitioner has failed to establish deficient performance under Strickland due to Petitioner's trial counsel's inability to obtain the services of a forensic pathologist or blood spatter expert. Further, the Court finds that if trial counsel had presented the testimony of an expert, such as that given by Dr. Arden in the habeas proceedings, including the blood spatter and weapon evidence, there is no reasonable probability that the results of

Petitioner's trial would have been different. Accordingly, these claims are DENIED.

7) Not Utilizing a Polygraph Expert

Petitioner asserts that trial counsel was ineffective for failing to hire a polygraph expert, whom he claims could have undermined the testimony of Joe Moore, to whom a polygraph examination was administered to allegedly attempt to flesh out the theory that Mr. Moore was one of the two perpetrators who committed the murders.

During trial counsel's cross-examination of Joe Moore, Mr. Moore sua sponte brought up the fact that he had been given a polygraph examination. (T. 1083-1084). Brannon objected to this reference to polygraph and asked for a mistrial. The trial court denied the motion for mistrial, and with the agreement of both parties, gave the jury a curative instruction directing that they disregard any mention of a polygraph. (T. 1086, 1109). There was no reason for trial counsel to rebut this evidence with a polygraph expert because the jury was instructed not to consider any evidence about the polygraph, so expert testimony would not have been permitted about inadmissible evidence.

Further, in denying Petitioner's claim that the trial court erred in denying a mistrial with regard to the mention of the polygraph, the Georgia Supreme Court held on direct appeal, "The trial court's strong curative instruction and its questioning of the jury regarding their ability to follow that instruction were sufficient to remedy any damage to the fairness of the proceedings." Lance, 275 Ga. at 22-23.

Further, Petitioner failed to show that trial counsel's performance was deficient in this respect or that Petitioner was prejudiced, as the record shows that trial counsel thoroughly cross-examined Mr. Moore's credibility, his motive for testifying, his hostility towards Butch Wood, Jr., the possibility that Mr. Moore shot Mr. Wood, Mr. Moore's changing story, and his whereabouts when the crime occurred. (T. 1119, 1122-1123). The record establishes that the jury heard about the inconsistencies of Mr. Moore's statements.

Further, the Court finds Petitioner's habeas expert's testimony that Mr. Moore's polygraph chart showed an immeasurable response unpersuasive. Petitioner's habeas witness, Cyrus Harden, conceded that he had testified less than ten times critiquing a polygraph test that someone else administered, that it is easier to testify about a polygraph test when you are the person who administered the test, and that he had administered polygraph tests to people who were under the influence, and "no response" does not mean that the person is lying. (HT 187-188). In contrast, Respondent presented the testimony of Paul Loggins, a polygraph expert who was assigned to the GBI's polygraph unit for fourteen years, has administered 7,030 polygraphs in the last eighteen years and administered the polygraph to Joe Moore on November 13, 1997. Mr. Loggins testified that he did not observe any indicator or physical characteristics that Mr. Moore was under the influence in any way when Mr. Loggins gave Mr. Moore the polygraph examination; and he saw nothing to preclude Mr. Moore from being adequately tested. (HT 473-486). Mr. Loggins testified that, based on his training and experience, he saw nothing to indicate that Mr. Moore was lying during

the polygraph test and his chart was not flat. (HT 492, 495). Mr. Loggins concluded that Mr. Moore did not respond in a deceptive manner and Mr. Loggins would classify Mr. Moore's chart as someone who was telling the truth about the deaths of Butch Wood, Jr. and Joy Lance. (HT 496).

The Court finds that Petitioner failed to carry his burden of establishing deficiency of performance and resulting prejudice and this claim is DENIED.

8) Not Utilizing a Fingerprint Expert

Petitioner asserts that trial counsel should have expended funds to hire a fingerprint expert to testify that no fingerprints belonging to Petitioner were found at the crime scene. Charles Moss, the GBI's forensic latent print examiner, testified at trial that the partial latent prints from the crime scene were of no value. (T. 1012). Defense expert Andrew Pennington testified at trial that shotgun shell hulls are a good surface to lift a latent print from and someone handling the ammunition would leave a print unless he was wearing gloves. (T. 1658). In his closing argument to the jury and in his testimony before this Court, Brannon also stated that there was no fingerprint evidence linking Petitioner to the crime. (HT 61; T. 1736). Thus, based on the evidence presented during the trial, the Petitioner was not linked to the crime through fingerprint evidence and trial counsel did not need to further explore this issue. Petitioner has failed to establish deficiency or prejudice and this claim is DENIED.

9) Failure to Investigate Petitioner's Mental Health and to Retain Mental Health Experts

Effective assistance of defense counsel, as guaranteed by the Sixth Amendment, requires the thorough investigation of a client's case, including any mitigating evidence that could be provided. The investigation of all matters relevant to a defendant's case is a necessary component of the Sixth Amendment right to effective assistance of counsel. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982).

According to the ABA guidelines in effect at the time of Petitioner's trial, counsel in a death penalty case should meet with his client immediately and, among other things, explore the existence of potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating or mitigating factors. ABA Guideline 11.4.1(D)(2)(a). With an eye towards the sentencing phase, counsel also should explore sources of information about the defendant's history, including his "medical history, (mental and physical illness or injury of alcohol and drug use, birth trauma and development delays)." Id. 11-4.1(D)(2)(c). Counsel also should promptly meet with witnesses "familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death." Id. 11.4.1(D)(3)). The ABA Guidelines articulate reasonable professional standards for capital defense work and have long been referred to as guides to

determining what is reasonable under the Sixth Amendment. Wiggins v. Smith, 539 U.S. 510, 524 (2003); Hall v. McPherson, 284 Ga. 219, 221 (2008).

The evidence is undisputed in this case that trial counsel did not investigate Petitioner's mental health, did not retain mental health experts, and did not present to the jury, during either the guilt/innocence phase or the sentencing phase of the trial, evidence of Petitioner's significant mental impairments. Petitioner asserts that there was extensive evidence concerning Petitioner's diminished mental capacity that was available to trial counsel which warranted further investigation. Petitioner also asserts that, had trial counsel hired a mental health expert to evaluate Petitioner, trial counsel could have presented evidence that Petitioner was a "borderline retarded" person who had trouble controlling his impulses and who had significant cognitive impairments and dementia due to his abuse of alcohol and head injuries from a gunshot wound, physical altercations, and car wrecks.

Upon consideration and review of all of the evidence presented in this case, the Court finds that there is nothing in the record to establish that Petitioner was legally insane at the time of the commission of the crimes. Additionally, there has been no showing that Petitioner was incompetent to stand trial. Finally, Petitioner is not mentally retarded. At the habeas proceeding Petitioner and Respondent each presented testimony from mental health experts, and those experts had varying opinions as to what effect Petitioner's mental impairments would have had on him at the time of the commission of the crimes. If such evidence had been presented at the guilt/innocence phase of the Petitioner's trial, a verdict

of guilty but mentally ill would have not barred a sentence of death at the penalty phase. Hall v. Brannan, 284 Ga. 716, 722-723 (2008); Lewis v. State, 279 Ga. 756, 764 (12) (2005). Even if the Court were to conclude that trial counsel's performance was deficient in failing to present evidence of Petitioner's mental health during the guilt/innocence phase of the trial, the Court finds that the Petitioner has failed to establish the prejudice prong of Strickland. Accordingly, this portion of the claim is DENIED.

Of particular concern to the Court, however, is the fact that trial counsel failed to investigate Petitioner's mental health and, thus, failed to present easily obtainable psychiatric mitigating evidence during the sentencing phase of the trial. A reasonable investigation into Petitioner's life history would show that further investigation into Petitioner's mental health was warranted in this case. The duty to investigate all available sources of mitigating evidence is heightened for counsel in capital cases, particularly in preparing for the sentencing phase, where trial counsel has the opportunity to present "*anything* that might persuade a jury to impose a sentence less than death." Head v. Thomason, 276 Ga. 434, 436-37 (2003) (emphasis in original).

"The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant." Cunningham v. Zant, 928 F.2d 1006, 101 9 (11th Cir. 1991). The U.S. Supreme Court has explained that:

> If the sentencer is to make an individualized assessment of the appropriateness of the death

> penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (internal quotation marks and citation omitted); see also Williams v. Taylor, 529 U.S. 362 (2002); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).

The harm stemming from the failure to present psychiatric mitigating evidence in capital cases is clear. It has long been recognized in Georgia that "evidence of a diminished capacity to fully appreciate the 'cruelty and gravity of his acts' is critical at the penalty phase of a capital case 'because in our system of criminal justice acts committed by a morally mature person with full appreciation of all their ramifications and eventualities are considered more culpable than those committed by a person without that appreciation.'" Bright v. State, 265 Ga. 265, 275, 455 S.E.2d 37, 50 (1995) (citations omitted). Psychiatric mitigating evidence "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior. 'Thus, psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors.'" Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (citations omitted). See also, Turpin v. Christenson, 269 Ga. 226, 241 (1998) (endorsing and

quoting Middleton on this point); Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1993) ("prejudice is clear" where attorney failed to investigate adequately client's mental health and present evidence of client's mental problems in sentencing phase).

Experts are critical in helping to tie the various aspects of a defendant's life history, which may include instances affecting mental health, into a coherent picture of the defendant's state of mind throughout his life path leading up to the crime. The Georgia Supreme Court has repeatedly held that the average capital juror is hindered in his sentencing deliberations when available psychiatric opinion testimony or other psychiatric mitigating evidence is not presented in court. In Bright v. State, the Court found that a psychiatrist would have been of invaluable assistance to the jury in deciding the defendant's fate: "a psychiatrist could have evaluated, in terms beyond the ability of the average juror, Bright's ability to control and fully appreciate his actions in the context of the events that arose on the night of the murders, given his severe intoxication, his history of substance abuse, his troubled youth, and his emotional instability." 265 Ga. 265, at 276 (1995). Similarly, in Turpin v. Lipham, the Court found counsel ineffective for failing to present the testimony of a mental health expert to help the jury understand the mitigating significance of the defendant's troubled upbringing and mental disorders: *"[T]he average juror is not able, without expert assistance, to understand the effect [the defendant]'s troubled youth, emotional instability and mental problems might have had on his culpability for the murder."* 270 Ga. 208, 219 (1998) (emphasis supplied). In this case, the jury was inexcusably deprived of expert testimony regarding Petitioner's

psychiatric disorders, history of alcohol abuse, and head trauma which was critical to informed deliberation as to sentence.

Although trial counsel is afforded tremendous deference over matters of trial strategy, the decision to select a trial strategy must be reasonably supported and within the wide range of professionally competent assistance. Devier v. Zant, 3 F.3d 1445, 1453 (11th Cir. 1993); Strickland, supra at 690. Before selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing. Jefferson v. Zant, 263 Ga. 316, 319-20 (1993); Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir.1995); Bush v. Singletary, 988 F.2d 1082, 1091 (11th Cir. 1993) ("After an adequate investigation, counsel may reasonably decide not to present mitigating character evidence at sentencing"). An attorney is not ineffective because he fails to follow every evidentiary lead, but an attorney's strategic decision is not reasonable " 'when the attorney has failed to investigate his options and make a reasonable choice between them.'" Baxter, supra, quoting Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir.1991). The failure to conduct a reasonable investigation may render counsel's assistance ineffective. Baxter, supra at 1514; Curry v. Zant, 258 Ga. 527, 530, (1988) (counsel ineffective for failing to further investigate client's mental health despite indications that client was mentally ill).

At the evidentiary hearing before this Court, Brannon acknowledged that he knew the potential importance of mental health testimony, as he had tried other death penalty cases where mental health was an issue. (HT 93; See Waldrip v. State, 264 Ga. 402

(1994)). In those prior cases Brannon had requested funds for mental health experts and presented mental health defenses and mitigation at trial. Id.

Brannon testified that, during his investigation and preparation for trial, he met and spoke with Petitioner frequently. (HT 1397). Brannon testified further that he and his paralegal assistant, Pat Dozier, had established an excellent rapport with Petitioner's family members and talked to them numerous times. (HT 1401-1405, 1410). After speaking with Petitioner and Petitioner's family members, Brannon felt that neither gave him any indication that Petitioner had any type of mental health problems. However, the record indicates that evidence regarding Petitioner's traumatic brain injuries and alcohol abuse was readily available to trial counsel. It was well known among Petitioner's family and friends that Petitioner was often involved in wrecks while racing cars, and that he rarely, if ever, sought medical care following these wrecks. (Pet. Ex. 10 ¶ 6; Pet. Ex. 26 ¶ 4). It was also common knowledge that Petitioner had a longstanding drinking problem. (Pet. Ex. 28 ¶ 16; Pet. Ex. 40 ¶ 5; Pet. Ex. 36¶ 4; Pet. Ex. 41 ¶ 10). Additionally, in 1993 Petitioner was shot in the head by unknown assailants while sleeping on his couch and, in direct conflict with his physician's orders, Petitioner refused to stay in the hospital. (Pet. Ex. 21 ¶ 11). After he was shot, Petitioner began having terrible headaches. (Pet. Ex. 31 ¶ 26; Pet. Ex. 5 ¶ 9; Pet. Ex 43 ¶ 11). Petitioner also experienced dizziness and had difficulty working on cars in his shop. He became even more quiet than he had before. (Pet. Ex. 21 ¶ 9). Finally, Petitioner was hospitalized at Georgia Regional Hospital for mental health treatment (Pet. Ex. 21 ¶ 13).

Even though Brannon has noted the importance of mental health evidence in capital cases, he testified that he did not investigate Petitioner's mental health in this case. He did not review medical records regarding Petitioner's numerous head traumas; did not review medical records regarding Petitioner's hospitalization for mental health treatment; did not inquire with Petitioner's family, friends, or any other members of the small-town community as to whether Petitioner had any history of mental health issues or whether he could have suffered some debilitating head traumas. Although Brannon testified at the evidentiary hearing that having Petitioner evaluated by a mental health expert was on his list of things to investigate in the case, he testified further that it was not a top priority. (HT 68-69). Consequently, Brannon did not request the assistance of mental health experts that could have revealed the significant mental impairments from which Petitioner suffers. Based on the wealth of information that was readily available to trial counsel, and the lack of other evidence to offer in mitigation, the Court finds that trial counsel's failure to investigate Petitioner's mental health was unreasonable.

The Court notes that "the reasonableness of an investigation, or a decision by counsel that forecloses the need for an investigation, must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation." Byram v. Ozmint, 339 F.3d 203, 210 (4th Cir. 2003). In this case, however, very little was offered in the way of mitigating evidence. Therefore, the Court finds that there was no strategic reason justifying trial counsel's

decision to forego the investigation of the Petitioner's mental health and to concentrate his time and efforts on other potential areas of defense and mitigation. He simply failed to conduct the investigation that reasonable professional norms require. Where, as here, the "failure to investigate thoroughly result[s] from inattention, not reasoned strategic judgment," counsel's performance is unreasonable and ineffective. Wiggins, 539 U.S. at 525; see also Hardwick, 320 F.3d at 1185 ("'counsel's failure to present or investigate mitigation evidence' cannot result from 'neglect'") (citations omitted).

In light of the readily available evidence regarding Petitioner's diminished mental capacity due to traumatic brain injuries and alcohol abuse, trial counsel's failure to specifically investigate Petitioner's mental health or to seek a mental evaluation of the Petitioner under these circumstances is constitutionally deficient performance. Cunningham, 928 F.2d at 1018 ("In light of the ready availability of this evidence [relating to petitioner's mild mental retardation] and in the absence of a tactical justification for its exclusion, the failure by trial counsel to present and argue during the penalty phase [evidence of petitioner's mental retardation] . . . [falls] outside the range of professionally competent assistance"); Christenson, 269 Ga. at 234-42.

Furthermore, had trial counsel investigated Petitioner's mental health, such an investigation/ evaluation would have provided significant mitigating evidence for the jury to consider. At the habeas evidentiary hearing Petitioner presented the testimony of three mental health experts (Dr. Hyde, Dr. Weinstein, and Dr. Pickar) and Respondent presented

the testimony of two mental health experts (Dr. Martell and Dr. Griesemer). While the mental health experts had varying opinions as to the degree and effect of Petitioner's mental impairments, all of the mental health experts, including those employed by the Respondent, testified that Petitioner suffered from mental impairments that render Petitioner borderline mentally retarded, and all provided testimony that would have been extremely important for the jury to consider in determining the appropriate sentence.

a) Petitioner's Mental Health Experts

Thomas Hyde M.D., Ph.D., an expert in Behavioral Neurology, testified that he performed an extensive neurological evaluation of Petitioner (over 100 tests) and concluded that Petitioner had "brain damage [frontal lobe damage] as a result of traumatic brain injury or the addictive effects of alcohol abuse." (HT 347-349, 369-371). Dr. Hyde Mer concluded that Petitioner was limited in his ability to conform his actions to the law, (HT 360), and he would be surprised if Petitioner was able to commit the crimes in this case. (HT 358).

Similarly, Ricardo Weinstein, Ph.D., an expert in Neuropsychology, found that Petitioner has frontal lobe damage. Dr. Weinstein also concluded that Petitioner has significant brain dysfunction and cognitive impairments. (HT 1037). He further noted that Petitioner was an alcoholic, (HT 1040), had been treated for depression and anxiety, (HT 1041), and that Petitioner appears to meet DSM-IV-TR criteria for a diagnosis of Dementia Due to Multiple Etiologies (head injuries plus chronic alcohol abuse). (HT 312). Dr. Weinstein further found Petitioner to have an IQ

of 78, which places him in the borderline range of intellectual abilities. Dr. Weinstein, however, did not conclude that Petitioner could not have planned and/or committed the crimes. Dr Weinstein testified that, in considering Petitioner's culpability for the crimes charged, it would be important for the fact finder to have information about Petitioner's impaired mental abilities. (HT 260).

David Pickar, M.D., an expert in Psychiatry and Clinical Neuroscience, testified that Petitioner suffers from neuropsychiatric impairments (dementia due to serious head trauma, frontal lobe dysfunction, alcohol abuse, and depression). Dr. Pickar testified that, in his opinion, the Petitioner had trouble planning and organizing based on frontal lobe issues. Dr. Pickar testified further that the neuropsychiatric impairments existed at the time of the murders and that the impairments would have significant implications for Petitioner's behavior at the time of the murders. (HT 968-970).

b) Respondent's Mental Health Experts

Daniel A. Martell, Ph.D., an expert in Neuropsychology, evaluated Petitioner and concluded that Petitioner suffered from brain dysfunction, but that it did not appear to affect Petitioner's ability to plan or control impulses. (HT 592-593). Dr. Martell agreed with Petitioner's expert (Dr. Weinstein) in finding that Petitioner appears to meet DSM-IV-TR criteria for a diagnosis of Dementia due to head injuries and chronic alcohol abuse. (HT 597). However, Dr. Martell concluded that Petitioner's history of head injuries did not affect Petitioner's cognitive functioning. (HT 585-586). Dr. Martel testified further

that Petitioner's IQ score of 79 placed Petitioner in the borderline range, higher than mild mental retardation and just one point away from being in the low average range. (HT 585). Although Dr. Martel testified that there was nothing to show that the Petitioner was incapable of committing the murders in this case, (HT 602), Dr. Martell also concluded that if Petitioner actually did commit the crime for which he was charged, his culpability for that offense would be affected by his brain dysfunction. Dr. Martell acknowledged that evidence regarding a defendant's mental illness, just like the information available, but never presented in Petitioner's trial, is routinely provided in capital cases. (HT 623-624.)

Dr. David Griesemer, an expert in Neurology, evaluated Petitioner and concluded that Petitioner suffered from mild cognitive dysfunction, as well as "anxiety and depression," but that it did not appear to affect Petitioner's ability to control impulses. Dr. Griesemer also concluded that the 1993 gunshot wound did not have an impact on the Petitioner's cognitive performance. Further, Dr. Griesemer found that the Petitioner appeared to be of low-average intelligence, but the Petitioner "fully retains his ability to understand lawful behavior and to conform his behavior to the requirements of the law." (Res. Ex. 54, HT 12315).

Introducing this mental health evidence would have been crucial in the sentencing phase of Petitioner's trial, as it directly related to the key issue before the jury: their individualized assessments of Petitioner's character, culpability, and worth. Trial counsel had no strategic reason for failing to inform the jury about Petitioner's mental deficiencies during

sentencing. In fact, Brannon testified that evidence concerning Petitioner's organic brain damage and mental deficits was "precisely the type of evidence" he wanted to present at trial. (Pet Ex ¶ 23.) Under these circumstances, the failure to provide the jury with evidence relating to Petitioner's mental impairments was objectively unreasonable. Crosby, 320 F.3d at 1164 (Eleventh Circuit has held that "[w]hen mental health mitigating evidence was available, and *absolutely none* was presented [by counsel] to the sentencing body, and . . . no strategic reason [w]as . . . put forward for this failure,'" the omission was objectively unreasonable); Brownlee, 306 F.3d at 1070 (holding that "counsel's failure to investigate, obtain, or present *any* mitigating evidence to the jury, let alone the powerful mitigating evidence of Brownlee's borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse, undermines our confidence in Brownlee's death sentence").

Respondent contends that the evidence of alcohol abuse and head injuries (car wrecks, fights, gunshot wound) presented by Petitioner in the habeas corpus proceedings is as potentially aggravating as it is mitigating. This contention fails to take into account that Petitioner's primary focus of his claim is trial counsel's failure to investigate and present evidence regarding Petitioner's mental health; particularly, his significant mental impairments. The fact that Petitioner's brain damage and diminished mental capacity may be attributed to one or more causes, including alcohol abuse and various forms of head trauma, is not the primary focus of Petitioner's claim.

Upon consideration and review of all of the evidence presented in this case, the Court finds that

trial counsel was ineffective for failing to investigate Petitioner's mental health as a possible source of mitigating evidence in this case. The Court finds that trial counsel's decision to forego the investigation of the Petitioner's mental health and to present very little in the nature of mitigating evidence was not a reasonable tactical decision under the circumstances. Further, the Court finds that trial counsel's failure to retain mental health experts and failure to present the evidence of the Petitioner's significant cognitive impairments to the jury during the sentencing phase of the trial constitutes legally deficient performance. In light of the strength of the mental health evidence offered at the habeas hearing, the Court further finds that there is a reasonable probability that, but for these deficiencies in trial counsel's performance, the outcome of the proceedings would have been different. See Hall v. McPherson, 284 GA 219 (2008) (affirming habeas court grant of sentencing relief based on trial counsel's failure to investigate or present mitigating background and mental health evidence at sentencing).

Accordingly, the Court finds that Petitioner is entitled to habeas relief on the portion of his ineffective assistance of counsel claim that is based on trial counsel's failure to investigate Petitioner's mental health, retain mental health experts, and present evidence of Petitioner's mental health in mitigation during the sentencing phase of the trial. The petition for writ of habeas corpus is GRANTED as to the death sentences imposed.

10) Investigation And Presentation of Other Mitigation Evidence

a) Residual Doubt theory

During the trial of this case Petitioner's counsel utilized the defense theory that Petitioner did not commit the crimes and was not present at the scene of the crimes at the time they were committed. The defense called nine witnesses during the guilt/innocence phase to support the Petitioner's alibi defense. The evidence presented by the defense in the guilt/innocence phase carried over into in the sentencing phase, and the theory that the Petitioner did not commit the crimes became a theory of residual doubt during the sentencing phase.

It has been noted that "residual doubt is perhaps the most effective strategy to employ at sentencing." See Tarver v. Hopper, 169 F.3d 710, 715-716 (11th Cir. 1999)(citing law review study concluding that "the best thing a capital defendant can do to improve his chances of receiving a life sentence ... is to raise doubt about his guilt"). The Georgia Supreme Court has expressly held that it is a reasonable and professional decision for a lawyer to choose a mitigation theory of residual doubt and to present testimony consistent with that theory. Head v. Ferrell, 274 Ga. 399, 405 (2001). See also Alderman v. Terry, 468 F.3d 775, 789-790 (11th Cir. 2006) (upholding the habeas court's finding that defense counsel's residual doubt strategy was a reasonable, professional decision given the information that was available to counsel at the time of trial and the fact that the defendant maintained his innocence); Parker v. Sec'y for the Dep't of Corr., 331 F.3d 764, 787-788 (11th Cir. 2003). Such was the

strategy employed by Petitioner's trial counsel in this case.

Trial counsel's reliance on particular lines of defense to the exclusion of others is a matter of strategy and is not ineffective unless Petitioner can prove the chosen course, in itself, was unreasonable. See Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000). In light of the circumstantial evidence presented by the State in the guilt/innocence phase, trial counsel's residual doubt strategy at first appears reasonable. However, based on the readily obtainable evidence of Petitioner's significant mental impairments, the Court finds that trial counsel's decision to forego the investigation of the Petitioner's mental health as a possible source of mitigating evidence and to rely solely on residual doubt as mitigating evidence was not a reasonable tactical decision under the circumstances. Compare Williams v. Head, 185 F.3d 1223, 1244 (11th Circ. 1999) (where counsel on motion for new trial conducted a reasonable investigation into possibility that defendant suffered from mental health problems when determining whether trial counsel's failure to present mental health evidence as mitigation evidence met the ineffective assistance of counsel standard); see also Turpin v. Lipham, 270 Ga. 208, 218 (1998) (the test for determining whether trial counsel's performance in the sentencing phase was deficient is whether a reasonable lawyer at the trial could have acted, in the same circumstances, as defense counsel acted at trial).

Trial counsel's performance was deficient and Petitioner was prejudiced as a result. Accordingly, for the reasons set forth in Section VII.A.9 above, the

petition for writ of habeas corpus is GRANTED as to the sentences of death.

b) Decision Not To Use Family Members

The Petitioner asserts that other types of evidence should have been presented in mitigation (good character, good father, not starting fights). This evidence was presented to the Court through the affidavits of family and friends. During the habeas evidentiary hearing, trial counsel stated his strategic reason for not calling this type of witness during the sentencing phase of Petitioner's trial. Specifically, he testified:

> Yes. All we're going to do, if we did that, was retry every bad word that had been said about Donnie during the entire trial. I knew that Mr. Madison would be allowed to cross-examine each person I called that had any knowledge of prior bad acts and that we were going right back over that evidence and reinforce it and repeat it in front of the jury.

(HT 103-104). In making his decision as to whether to present Petitioner's family during the sentencing phase of trial, counsel stated:

> And I did talk with them about that. And I thought about putting them up. But I told them here's what you're going to be faced with. And really nobody – I mean, they love Donnie and wanted to help Donnie, but nobody was dying to sit on the witness stand and be beat to death for

> another two or three hours with testimony that we'd already heard in the courtroom.

(HT 105).

The record establishes that trial counsel made a strategic decision to not present any of Petitioner's family members during the sentencing phase. The record indicates that trial counsel had numerous conversations with Petitioner's family members and interviewed various witnesses regarding Petitioner's case. (HT 10772-10790; and Pet. Ex. 4; Pet. Ex. 5; Pet. Ex. 15; Pet. Ex. 16; Pet. Ex. 18; Pet. Ex. 21; Pet. Ex. 22; Pet. Ex. 27; Pet. Ex. 28; Pet. Ex. 36; Pet. Ex. 38). Prior to the sentencing phase closing arguments, trial counsel informed the trial court that he would not be presenting any of Petitioner's family members during the sentencing phase. Specifically, trial counsel stated:

> No, sir. We're not going to call in the family members for the reason that if we put them on the stand and they tell about Donnie, he's a good guy, and the things that they know about him and then subject to cross-examination the specific bad acts that would be allowed, we'd be all afternoon hearing the same negative similar transaction and prior difficulty hearing that we've heard for three days. So I'm not going to call family members to the stand.

(T. 1917-1918).

Trial counsel was concerned that the State would again question character type witnesses and again review evidence of Petitioner's prior violence against Joy Lance and Butch Wood including: approximately

six months prior to the murders Petitioner offered Mary Lance one thousand dollars to kill Joy Lance and Butch Wood Jr. (9/28/98 Pretrial Hearing, pp. 48-50); Petitioner telling various people he would kill Joy Lance and Butch Wood (9/28/98 Pretrial Hearing, pp. 50-51, 81, 109, 147, 157; 9/29/98 Pretrial Hearing, pp. 207, 259); Petitioner attempting to electrocute Joy in a tub of water (9/28/98 Pretrial Hearing, pp. 53, 58-59; 9/29/98 Pretrial Hearing, p. 220-221); Petitioner holding a pistol to Joy's head and threatening to kill her (9/28/98 Pretrial Hearing, pp. 74, 114); telling his and Joy's son that Joy, was a "slut whore mama," that she did not love him and to give his mother a "big hug bye because it will be the last time you see her" while holding a loaded gun to her head in front of the child (9/28/98 Pretrial Hearing, pp. 74, 114; 9/29/98 Pretrial Hearing, p. 238); Petitioner beating Joy with a gun (9/28/98 Pretrial Hearing, pp. 75, 115, 128); attacking Joy with a loaded gun and a chainsaw (9/28/98 Pretrial Hearing, pp. 81-83; 9/29/98 Pretrial Hearing, pp. 207, 259); pouring a flammable liquid in Joy's hair and then threatening to set her on fire (9/28/98 Pretrial Hearing, pp. 81, 109; 9/29/98 Pretrial Hearing, pp. 206-207, 258-259); and kicking in the back door of Butch Woods' residence brandishing a loaded shotgun (9/28/98 Pretrial Hearing, pp. 145, 151-153, 164; 9/29/98 Pretrial Hearing, pp. 216-218).

The Court finds that trial counsel's strategic decision not to present character witnesses in mitigation was reasonable. Thus, this Court finds that trial counsel was not deficient and Petitioner was not prejudiced by trial counsel not submitting the testimony of Petitioner's family members, which trial counsel reasonably determined may have been more

aggravating than mitigating to Petitioner's case. This claim is therefore DENIED.

c) Evidence Concerning Petitioner's Relationship with his Children

In the proceedings before this Court, Petitioner submitted affidavits from family and friends, including Petitioner's daughter, Stephanie Lance, to support his assertion that trial counsel was ineffective in not presenting evidence that Petitioner had a loving relationship with his children as mitigating evidence.

During the evidentiary hearing before this Court, trial counsel testified that he spoke with Petitioner's children. (HT 8335). Trial counsel testified that he reviewed the affidavit of Stephanie Lance, and that the affidavit was consistent with what he learned from talking to Stephanie. (HT 8335-8336). However, trial counsel testified that he did not present the testimony of Petitioner's children due to the emotional trauma it would cause them and because they lacked any "superior piece of testimony." (HT 8336).

With regard to the testimony of Petitioner's other family members and friends, trial counsel stated that he chose not to present their testimony because he did not want them to be subjected to a cross-examination by the State regarding the prior difficulties between Petitioner and Joy Lance, which trial counsel felt would have been handful to the Petitioner.

The Court notes that trial counsel stated to the jury during his closing arguments that Petitioner had children who loved him. (T. 1943). He argued that if they sentenced Petitioner to death, then Petitioner's

two children would not have a mother or father. (T. 1946-1947). Trial counsel asked the jury to "think about this long and hard before you decide to eliminate somebody. Think about Jessie and Stephanie." (T. 1948). Counsel argued that it was a "powerful thing, to take somebody's life. It will sect you forever." (T. 1944).

The Court concludes that trial counsel was not deficient in not presenting the Petitioner's children and family members to testify as to Petitioner's relationship and love for his children. Further, the Court finds that Petitioner has failed to show that he was prejudiced by trial counsel's decision in this regard. Therefore, this claim is DENIED.

d) Evidence of Petitioner's Nature to Help Others

Trial counsel was not unreasonable in not calling character witnesses to testify during the sentencing phase of trial. "The fact that [Appellant] and his present counsel now disagree with the difficult decisions regarding trial tactics and strategy made by trial counsel does not require a finding that [Appellant] received representation amounting to ineffective assistance of counsel." Stewart v. State, 263 Ga. 843, 847 (1994) (citing Van Alstine v. State, 263 Ga. 1, 4-5 (1993)). See also Rogers v. Zant, 13 F.3d 384; Strickland, 466 U.S. at 700 (Strickland claimed that trial counsel was ineffective for not offering evidence that numerous persons thought Strickland was generally a good person. Court found the character evidence would not have changed the sentence imposed).

Further, trial counsel was not unreasonable in not calling these lay witnesses to testify on Petitioner's

behalf as counsel clearly stated his concern about putting up witnesses that would be cross-examined by the State regarding prior difficulties between Petitioner and Joy Lance. (HT 103-104). Informed strategy decisions by experienced counsel, such as this decision by Brannon, are the type of actions which Strickland prohibits being "second guessed" by reviewing courts. See also Jones v. Smith, 772 F.2d 668 (11th Cir. 1985); Gates v. Zant, 863 F.2d 1492 (11th Cir.) cert. denied, 110 S.Ct. 353 (1989).

Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden which is Petitioner's to bear, is and is supposed to be a heavy one. And, "[w]e are not interested in grading lawyers performances; we are interested in whether the adversarial process at trial . . . worked adequately." See White v. Singletary, 972 F.2d 1218, 1221, 11th Cir. 1992." Rogers v. Zant, 13 F.3d at 386.

As such, the Court finds that trial counsel cannot be deemed deficient in making the strategic decision under the facts of this case not to present these character witnesses during the sentencing phase of trial and that Petitioner was not prejudiced by trial counsel's tactical decision. This claim is DENIED.

B. OTHER CLAIMS

1) Mental Retardation (Claim III)

Petitioner alleges that the imposition of the death penalty is unconstitutional in this case because his

mental impairments render him the "functional, moral, legal, and constitutional equivalent" of an offender who is mentally retarded. The Court has previously found this claim to be procedurally defaulted. Regardless of whether the Court considers the claim for a miscarriage of justice excusing the default or on the merits, the claim fails. Petitioner has not established that his mental impairments rendered him mentally retarded, and Petitioner's mental impairments do not automatically exempt him from capital punishment.

Neither federal law nor Georgia law precludes capital punishment for someone with "mental impairments." In Georgia, the death penalty is only barred for offenders who were under the age of 18 at the time of the crime and for offenders who have been found to be mentally retarded under O.C.G.A. § 17-7-131(j).

Petitioner attempts to equate his alleged "mental impairments" with mental illness, which he, in turn, argues equates with mental retardation. Yet, Georgia law does *not* preclude a death sentence for someone who simply has been diagnosed with a mental illness. See O.C.G.A. § 17-7-131; Lewis v. State, 279 Ga. 756, 764 (2005)(finding that "unlike a verdict of guilty but mentally retarded, the statute that provides for a verdict of guilty but mentally ill does not preclude a death sentence as a result of such verdict").

Significantly, the Georgia Supreme Court has expressly held that Atkins does not apply to persons who are not mentally retarded. In Lewis v. State, the Georgia Supreme Court heard the issue of whether the "ban [in Atkins] on executing the mentally retarded

should be extended to apply to the mentally ill because [of] ... diminished culpability." 279 Ga. at 764. The Georgia Supreme Court rejected this claim, specifically "declin[ing] to extend the holdings of cases like Atkins" to a petitioner who claims to be mentally ill. Id.

The record before this Court shows that Petitioner's experts did not find that Petitioner was mentally retarded, but instead found that he functioned in the range of borderline intellectual functioning. (HT 790-816, 968-978, 1031-1063). Because Petitioner is not mentally retarded, there is no legal impediment to the imposition of his death sentence for the purposes of retribution or deterrence. Petitioner's alleged mental impairments are legally insuffcient to excuse his culpability or preclude him from being executed, and therefore, this claim is DENIED.

2) **Sentencing: Phase Jury Instructions (Claims XXV and XXV)**

As errors in the sentencing phase charge to the jury are "never barred by procedural default," these claims are properly before this Court for review on the merits. Head v. Ferrell, 274 Ga. 399, 403, 554 S.E. 2d 155 (2001).

A review of the sentencing phase jury instructions, in their entirety, establishes that Petitioner failed to show that the trial court erred in defining mitigating circumstances or erred in not instructing the jury that unanimity was not required to impose a life sentence. The jury instructions in this case regarding mitigating circumstances and unanimity have all been held to be constitutional by the Georgia Supreme Court. See, e.g., King v. State, 273 Ga. 258, 276 (2000); Nance v. State,

280 Ga. 125, 126 (2005); Walker v. State, 281 Ga. 157, 165 (2006). See also McClain v. State, 267 Ga. 378, 386 (1996)(holding that a jury need not be instructed as to specific standards for considering mitigating circumstances so long as the jury is allowed and instructed to consider the evidence in mitigation and is instructed that it has a discretion, notwithstanding proof of aggravating circumstances, to impose a life sentence); Ford v. State, 257 Ga. 461 (1987)(the Georgia statutory capital sentencing scheme does not require a weighing or balancing of mitigating and aggravating circumstances); Jenkins v. State, 269 Ga. 282, 296 (1998)(holding that there is no error in refusing to charge the jury that its failure to reach a unanimous verdict as to sentence would result in imposition of a life sentence).

Accordingly, the trial court properly instructed the jury and this claim is DENIED.

VIII. CONCLUSION

Upon consideration of Petitioner's claims in the habeas corpus petition, Respondent's argument in opposition, the evidence presented in these proceedings, the applicable law, and all matters appropriate, the Court concludes that Petitioner is entitled to certain habeas relief as set forth below.

Based on the foregoing finding of fact and conclusions of law, the Court hereby Orders that the writ of habeas corpus is DENIED as to Petitioner's convictions and is GRANTED with respect to the death sentences imposed by the jury in Criminal Case No. 98-CR-0036 in the Superior Court of Jackson County, Georgia, and Petitioner's death sentences are hereby

VACATED. Nothing in the Order shall prohibit the trial court from conducting further proceedings regarding sentencing, and nothing in this Order shall preclude or prohibit the State from again seeking the death penalty in such proceedings.

The Clerk of the Superior Court of Butts County is directed to serve copies of this Order upon Petitioner's counsel of record, Respondent's counsel of record, and the habeas law clerk of the Council of Superior Court Judges.

IT IS SO ORDERED, this 22nd day of April, 2009.

/s/Michael C. Clark
MICHAEL C. CLARK
Judge Superior Court
Sitting by Designation in
Butts County Superior Court

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APPENDIX C

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS STATE OF GEORGIA

CIVIL ACTION FILE NO. 03-V-490

[August 28, 2006]

DONNIE CLEVELAND LANCE)
Petitioner,)
)
vs.)
)
WILLIAM TERRY, WARDEN,)
GEORGIA DIAGNOSTIC AND)
CLASSIFICATION PRISON,)
)
Respondent.)

VOLUME I (pages 1 through 271)

Transcript of proceedings given before The Honorable Michael C. Clark, August 28, 2006 through August 30, 2006, at Jackson, Georgia.

APPEARANCES OF COUNSEL:

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For the Respondent: KRISTIN SCHMIT WHITE
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* * *

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Q. What about this case, if anything, was different about the punishment or penalty phase from your perspective?

A. It's not necessarily this case. It could be most cases. But in this one in particular the Lances all felt sure that Donnie was innocent, and Donnie told me he was innocent and I believed him. And I met with Donnie countless times before the trial. You can't go in to a family who's hired you and they've hired you because -- and this is not making me sound important -- but they hire you because you have a reputation for winning some cases and you've gotten acquittals in cases that were very difficult and they know it.

They came in and the first thing you start talking about is what we're going to do when we lose. Then their level of confidence with the lawyer they're hiring is hurt immediately and they begin to question your commitment to the case. So -- and that is in a lot of death penalty cases. But this family clearly believed he was innocent. I did too. I really tend to love this

family. I don't mind saying that. They treated me like I was a member of the family, and this was a really important case to me.

I thought if I could get a another counsel appointed, I would turn him loose to discuss with them the things that we should be working on, assuming something went wrong and there was a conviction. And that would isolate them from thinking that I might be thinking in terms of losing the case.

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Q. Now, I want to jump ahead and then I'm going to come back. As we said, the trial was in December of 1999 -- excuse me in June of 1999. I apologize, sir. So this is December of 1998, six months before that. At this time you didn't know a trial date, did you, of June of 1999?

A. No, Sir.

Q. Now, when the trial actually came up in June of 1999 had you been able to fully investigate the punishment or penalty phase of the case?

A. Oh, no. We were working nonstop day and night on the guilt-innocence phase.

Q. So let's talk about what you were doing and I want to go over the rest of this summary. You indicated on the summary that there's a significant number of witnesses to interview, witnesses' statements to analyze, and criminal records to research; is that correct?

A. That's correct.

Q. Okay. And why were there such a significant number of witnesses in this case? Was there something about the type of the case it was that made it so significant in terms of the number?

A. Well, a great deal of the number was what I call bad acts witnesses or bad prior acts, and those were numerous. I forgot the exact number but they had, as I recall, over 30 prior difficulties that I had to deal with in the case. I did

[p.46]

not know that when I took the case on. But when I got into it I realized that. So I had 30 other cases to defend at trial with I don't know how many witnesses. I'll tell you this. The last supplemental witness list, as I recall -- and I could be wrong.

THE WITNESS: And if I am wrong, Judge, the record will reflect if I am or not. But I had something like 143 witnesses that I needed to interview.

BY MR. LOVELAND:

Q. Were you able to interview all those witnesses without a second counsel?

A. No.

Q. Now, you mentioned bad acts and the third bullet point that I identified here is numerous other crimes in the form of similar transactions and prior

difficulties. Is that what you were referencing in your request for counsel at that time?

A. I was. And there was even a similar -- there was a case in which Donnie had gotten in a fight with some people and he was defending himself and we didn't even have time to try and locate the people, the fight, what happened with that. We were too busy attempting to get ready for the guilt-innocence phase. So that's something that I didn't get to spend much time on that I would like to have had. And I told the Jury during the case that there's 30 something cases here for me to

[p.47]

defend, not just one.

Q. In addition to that, could you talk to us for a moment about the nature of the scientific evidence that you referenced in the second bullet point on this sheet where you wrote that extensive amounts of scientific and other expert evidence is anticipated and must be analyzed?

A. Right. In this case the only way you can successfully defend it, in my opinion, was you would need to be able to try to neutralize or attack particularly the Luma-Lite evidence and testimony. I think that --

Q. Tell us what that is. you've used that term a couple times. what was the Luma-Lite evidence?

A. It's a blue light device, kind of like when we were all in college in fraternities and they would turn

on the blue light and light up the colors on the wall. That tells how old I am, I guess. That was back in the 70's. But anyway, what it will do is if you have –

Q. They called it a black light back then.

A. Yeah, black light. If you have an imprint that doesn't even show up like on a white door and you put a glowing blue Luma-Lite on it, and it will show up. It will bring it out and you can see it. Now, the reason that's absolutely critical is that was one of the high points of the case. That was a key issue, that they tied that blue Luma-Lite footprint to one pair -- or one shoe that Donnie allegedly had on that

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was similar to that. And I had no way to defend against it other than cross-examination by me. I mean, I'll admit I read everything I could find on Luma-Lite. I stayed up day and night trying to become a microanalyst. But the truth is -- and the judge made sure the jury knew it -- everything I said and did was not evidence.

Q. Part of the traditional instruction that a trial court gives the jury in a case, the arguments and statements of the lawyers are not evidence?

A. Yeah, but it was more times than you usually hear.

Q. I hear you. Now, what was the result of the motion you filed for the appointment of the second counsel to assist you?

A. It was denied again.

Q. And look at Exhibit 223 which will be the next exhibit in this book, if you would, sir? I'm sorry. 224. Is 224 the order denying your motion for appointment of additional counsel?

A. Yes, sir, it is. That was the first denial. He denied it again prior to trial.

Q. You renewed your request for counsel again shortly before trial and it was denied again; is that correct?

A. That's correct.

Q. Now, let's go back to Exhibit 223. Exhibit 223 is the transcript of a hearing held in this matter on December 3

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of 1998 before The Honorable T. David Motes, Judge of the Superior court of Jackson County. Were you the counsel who appeared on Mr. Lance's behalf at that time?

A. I was.

Q. And turn, if you would, Sir, to page 13 of that transcript?

A. I'm there.

Q. And did you on page 13 of the transcript indicate to the Court, quote, I'm asking for additional

counsel because we just -- it's killing me. It's got where it's day after day after day trying to do it?

A. Yeah, I said that, that's for sure. And that was the truth. We were just working on the case constantly.

Q. And did you go on and say, And on the northeastern judicial circuit, if this is helpful, they always put two lawyers on every death penalty case. sometimes they put three?

A. I did. And the last case I had tried, a death penalty case on that circuit, I had two assisting me.

Q. And turn over, if you would, sir, to page -- if I can find it -- page 18 of the transcript. And about halfway down the page did you say to the Court, It's possible what was considered adequate compensation for appointment was the latest case I've seen is $150 an hour. Here's what the manual says. Most Georgia courts routinely appoint two attorneys to defend a capital case as recommended by the guidelines for appointment

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and performance of counsel in death penalty cases of the American Bar Association?

A. Yeah. I must have said that. I'm proud of myself.

Q. And did you go on, Mr. Brannon, and explain that in this case, again, because of the need to have someone focusing on the punishment phase and that

you didn't have time to do that, that was critical on the bottom of page 18 and top of page 19?

A. Oh, absolutely. It's always critical. And I did say that.

Q. And did you say, quote, And secondarily, Judge, I haven't said this, but when you prepare for one of these, if you don't prepare for the punishment phase ahead of time, I mean, it's going to get reversed for ineffective assistance of counsel?

A. Yes, I did. The 150-an-hour figure had come down in a Federal case which was relatively recent at that time when a case had gone up on what would be fair compensation, because they didn't pay anything like that on the northeastern circuit and on most other circuits. That's the reason I pointed that out to the judge at the time.

Q. Turn if you would, Mr. Brannon, to Exhibit 226, which is a big, thick exhibit.

A. Okay.

Q. Labeled American Bar Association Guidelines For the

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Appointment and performance of counsel in Death penalty Cases, 1989. You referred a moment ago in the transcript to the ABA guidelines; did you not?

A. I did.

Q. Look at page three.

A. Okay.

Q. And guideline 2.1, which says, In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. Was that the guideline you were referring to?

A. Yes, sir, it was.

Q. Now, you mentioned a moment ago that you renewed your request for additional counsel shortly before trial and it was denied again?

A. That's correct.

Q. So when we get to the trial in June of 1999 is there anyone other than you representing Donnie Lance?

A. Attorney wise, no, sir. I had a paralegal.

Q. You had one paralegal. Now, how about the prosecution? They had two and three attorneys at the table for the prosecution, didn't they?

A. Yes, sir. They had a lot of people over there, but most of the time they had at least two or three.

Q. Now, we're now in this period of early 1999, the Court has denied your request for second counsel. Did you also

[p.52]

during this time, late '98, '99, make, a request for funds for experts?

A. I did.

Q. Before we get there I want to ask you a question, sir. In your judgment, how did the decision of the trial court to not appoint a second lawyer impact your ability to represent Donnie Lance?

A. It was critical that I have a second lawyer. And to be candid, if you read the transcript of the day I made the argument, I was virtually sure -- and I really got fooled on this one -- that I was going to get an associate counsel without a problem. So I was really surprised when the answer was no. And I realized then that we were really -- this is going to be tough to get ready for guilt-innocence and to try and come up with something on punishment and mitigation phase. plus it would require me to sit down with the family and chronically talk about the mitigation phase.

Now, I'm going to keep saying when you do death penalty cases that's not easy to do. That's hard to do. The family's scared. They're sure that their son or daughter or father is innocent, and it really makes it a virtually impossible task, to be honest.

Q. You mentioned that there was a supplemental witness list with 143 names of witnesses from the prosecution. Were you as one lawyer able to investigate and talk to all those

[p.53]

143?

A. No. what I did was we called the people as fast as we could, and I told Andy Pennington to get them on the phone or go see them, highlight real quick whether or not they have anything to say which might be beneficial or harmful, either one, and then make a memo or just call me, if we don't have time, and tell me. And we were having to do it that fast for me to make decisions about witnesses.

Q. Was it a thorough examination and investigation, in your opinion, of those 143?

A. Not what I would have done if I'd had the assistance of people, no. It wasn't as thorough as I would have done it.

Q. What about on the roughly 30 prior acts? Were you able to fully investigate those without another counsel to help you?

A. Oh, no. No, couldn't do that either.

Q. Were those 30 prior acts important to the State's case against Mr. Lance?

A. Oh, I mean, that was part of the case that was devastating. I mean, you're trying 30 other crimes or alleged crimes on top of what you've already got to deal with -- and I've argued this over and over again. I think we finally have some decent Georgia law that they shouldn't be able to -- certainly not go first, but

not just go on and on and on with prior bad acts in order to set the stage for the jury before

[p.54]

you ever get to try to defend your client. And that's what you're doing.

And some of these things are years old. And you've got to have people go find witnesses that may not even be around anymore. It's ridiculous, to be candid, and it's a clear violation of anyone's right to fair trial, in my opinion.

Q. Mr. Brannon, let me ask you again, and I want to talk about the trial for a moment where you're doing it by yourself. Did you get much sleep during that time?

A. Well, no, I didn't. Now, let me say first I'm kind of a mad dog when I'm on trial and people know that about me. So I don't -- I don't leave the courthouse, go drink a beer and watch a baseball game. I work. And I try to get myself in bed by 12:00 or 1 o'clock if I can, and I usually get up around 6:00 or 7:00. In this case there were so many phone calls I was having to make trying to locate witnesses, trying to keep the family informed, that it was not unusual for me not to go to sleep until 3:00 or 4:00 in the morning and then have to get up in a couple hours and get started again. As I told the judge I was very fatigued at times during the trial.

Q. And you didn't have anything -- it wasn't like a relay race for you. You didn't have anybody you could

hand the baton to and let them run the next leg; is that right?

A. No, sir, I didn't.

Q. I'd like to shift gears for a moment, Sir, and that's

* * *

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A. Yes.

Q. Did Dr. Martell do a test to try and evaluate Mr. Lance's IQ before the gunshot?

A. Yeah. Dr. Martell used a statistical and actuarial procedure which I'm not very familiar with. I've seen it but I've never used it. But in his analysis he concluded that he disagreed with me. He disagrees with me because he's concluding that Mr. Lance's IQ prior to all these incidents was approximately 70.

Q. Was approximately 70 before the gunshot?

A. That's what he concluded.

Q. And that would put certainly within the range of mental retardation; correct?

A. Absolutely; especially when you correct it for the Flynn Effect and you can see the standard error of measurement, you're talking 65 to 75.

Q. Your final conclusion, could you summarize that for us?

A. Well, my final confusion is that this kind of brain dysfunction impacts his -- negatively impacts his ability to conform his conduct to the requirements of the law. And I'm not suggesting he's insane and I'm not suggesting that he doesn't understand right from wrong or that he doesn't understand that certain behaviors are unacceptable. What I'm saying is that there is a diminished capacity in the

[p.264]

understanding and the actual conforming his behavior due to the significant brain dysfunction that was identified through these, what I call comprehensive evaluation of brain function.

Q. Is the type of evaluation that you've done of Mr. Lance here the type of evaluation that you do of other individuals who are in the criminal justice system?

A. I do it all the time with the exception of the QEEG because, for instance, in the State of California, even though they try to -- with court orders they do not allow me to bring a computer into the prison. When I'm not allowed to bring my equipment, obviously I don't do it but I do everything else. But in general terms this is what I believe should be done and this is what I do in these cases.

Q. And is it the sort of information that you generally offer in evaluating an individual in the system in terms also of what the penalty should be for any crime they may have committed?

A. Yes. This is -- depending on the defense team, sometimes I'm asked to present this as part of their case in the guilt phase, but definitely it's always part of the mitigation factors of the crime.

Q. One final question for you, sir. Dr. Martell's report actually reaches a diagnosis under DSM-IV; is that correct?

A. That is correct.

* * *

[p.272]

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS STATE OF GEORGIA

CIVIL ACTION FILE NO. 03-V-490

[August 28, 2006]

DONNIE CLEVELAND LANCE Petitioner,	)
vs.	)
WILLIAM TERRY, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,	)
Respondent.	)

VOLUME II (pages 272 through 569)

Transcript of proceedings given before The Honorable Michael C. Clark, August 28, 2006 through August 30, 2006, at Jackson, Georgia.

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* * *

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Q. But it wouldn't surprise you for someone who has frontal lobe dysfunction to hold a regular job, for example?

A. No, not at all.

Q. Okay. Let me ask you this, Dr. Hyde. I'm going to ask you to consider this hypothetically. The question is: would you expect for someone who has significant frontal lobe damage to have the capacity to organize and plan a crime that involves leaving behind no fingerprints, that involves not leaving a murder weapon, leaving no hair evidence, that involves receiving no fibers from the scene or hair from the scene and basically a situation where there's no evidence that the crime happened? Would that surprise you for someone who has that degree of damage to organize, plan, and execute that crime in such a way that they leave no evidence behind?

A. That would surprise me. Most people with frontal lobe damage who are involved in the criminal justice system are involved in crimes of impulse rather than crimes of delicate and intricate planning.

Q. Okay. And tell us why you reach that conclusion that you would not expect someone who had frontal lobe damage to be able to execute and plan that crime and not leave evidence.

A. People with frontal lobe damage would have to have the ability to have a lot of abstraction abilities. They would have to have a good working memory of all the possible elements that might lead them to be implicated in a crime and carry that

[p.359]

with them to the crime site and then follow it through in implementing each detailed aspect of manipulating the crime scene in order to avoid their self-implication in that crime scene. And the working memory deficits characteristic of somebody with frontal lobe damage usually preclude them from committing such a crime in such a fashion.

Q. Okay. And I think I understand what you're saying, but can you describe for the record and the court what you mean by working memory deficit?

A. The frontal lobe is sort of the mental scratch pad. It's how we hold information and manipulate it and use it in our mind. So for example, an example of working memory would be where you go in the kitchen and you say okay, I need milk, oranges, cereal, salt, garlic powder, hot dogs and mustard. And then you carry that information with you, hold it in your mind, go to the grocery store, go to each appropriate aisle, get each piece of food stuff and put it in your cart and not get distracted by extraneous things or forget

extraneous things and leave things behind and impulsively get things that you don't need or want.

Q. Okay. Dr. Hyde, do you have any opinion as to whether the conditions present in Mr. Lance's brain, and specifically your diagnosis of static encephalopathy, would have limited his ability to conform his behavior to the requirements of the law?

[p.360]

A. Yes. under periods of emotional distress, I believe an individual with his degree of frontal lobe impairment due to traumatic brain injury and/or the additive effects of alcohol resulting In frontal lobe dysfunction would have had that difficulty.

Q. Okay. And, Dr. Hyde, if you had been called as a witness in Mr. Lance's murder trial, would you have been willing to testify that Mr. Lance had an abnormal brain due to prior closed head brain trauma?

A. Yes, I would.

Q. And if you had been called as a witness in Mr. Lance's murder trial, would you have been willing to testify that he suffered from a lack of ability to plan and organize a crime that would leave no trace of evidence?

A. Yes, I would.

Q. Thank you, Dr. Hyde. I think the State's lawyer will have some questions for you.

THE COURT: Okay.

CROSS-EXAMINATION

BY MS. WHITE:

Q. Good morning.

A. Good morning.

Q. I'm Kristin white. who first contacted you about being an expert in this case?

A. Beth Wells.

* * *

[p.570]

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS STATE OF GEORGIA

CIVIL ACTION FILE NO. 03-V-490

[August 28, 2006]

DONNIE CLEVELAND LANCE
Petitioner,

vs.

WILLIAM TERRY, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondent.

VOLUME III (pages 570 through 871)

Transcript of proceedings given before The Honorable Michael C. Clark, August 28, 2006 through August 30, 2006, at Jackson, Georgia.

APPEARANCES OF COUNSEL:

For the petitioner: JOSEPH LOVELAND
LISA WOLGAST
JAMES BOSWELL
Attorneys at Law

For the Respondent: KRISTIN SCHMIT WHITE
BETH BURTON
Attorneys at Law

MARY M. (GIGI) GRUBB
Certified Court Reporter
P.O. Box 1950
Lawrenceville, Georgia 30046-1950
Phone: (770) 822-8633

* * *

[p.623]

the neuropsychological exam and compare him to others of his age and education, that you realize that he has these impairments. That being said, there might have been some indicators if he had problems with word finding or some tendency to repeat himself that might have been picked up and noted. But I'm not sure it would have been adequate to trigger a full neuropsychological exam.

MS. WHITE: One moment. Okay. I'm finished. No further questions.

FURTHER CROSS-EXAMINATION

BY MR. LOVELAND:

Q. Dr. Martell, in fact, forensic neuropsychological evaluations are done at the trial level all the time allover the United States?

A. Sure, they are.

Q. And it's one of the things you do; right?

A. It is.

Q. And you do it to help people assess whether someone is -- well, just to evaluate them and to give your opinion on that evaluation and you present that to courts all the time?

A. I do.

Q. And you present it to juries all the time?

A. I do.

Q. And don't you believe in this case the jury should have heard this evaluation of Donnie Lance?

[p.624]

MS. WHITE: Objection, Your Honor.

THE COURT: Okay. I'll overrule the objection.

THE WITNESS: It's my opinion that juries should be given all the information they can have.

BY MR. LOVELAND:

Q. And this is significant information you've given us today, isn't it, in your judgment?

A. Sure.

Q. Thank you, sir.

THE COURT: Charging for it, you know.

THE WITNESS: I came all the way out from California to give insignificant information.

MR. LOVELAND: I would hope not.

THE COURT: That was cold. Anything else, Ms. White? He had one answer.

MR. LOVELAND: I know that, Your Honor.

FURTHER DIRECT EXAMINATION

BY MS. WHITE:

Q. Was your diagnosis significant to the crime in this case?

A. In my opinion, it's not significant to the crime.

MS. WHITE: No further questions.

THE COURT: Okay. Anything else?

MR. LOVELAND: No, Your Honor.

THE COURT: Okay. Thank you.

* * *

APPENDIX D

IN THE SUPERIOR COURT OF BUTTS COUNTY STATE OF GEORGIA

Case No. 2003-V-490

DONNIE CLEVELAND LANCE,)
)
Petitioner,)
)
v.)
)
WILLIAM TERRY, Warden,)
Georgia Diagnostic and)
Classification Prison,)
)
Respondent.)

Habeas Corpus

AFFIDAVIT OF J. RICHARDSON BRANNON

COUNTY OF HALL)
) ss.
STATE OF GEORGIA)

Comes now J. Richardson Brannon, before the undersigned officer duly licensed to administer oaths and swears and states as follows:

1. My name is J. Richardson Brannon and I am over the age of eighteen. The information contained in this affidavit is based on my personal knowledge and I am competent to testify to matters contained herein.

2. I am an attorney in good standing with the State Bar of Georgia and have been duly licensed to practice law since 1978. Since 1979, I have operated a solo law practice, The Brannon Law Office, located at 400 Jesse Jewell Parkway, Gainesville, Georgia, 30501, 770-503-0140. At the time of Donnie Lance's trial, my office consisted of myself and one paralegal.

3. In November of 1998, I was approached by Sheila Oliver about representing her brother, Donnie Cleveland Lance, who was being investigated for the capital murders of Joy Lance and Dwight "Butch" Wood, Jr. After discussions with her and with Donnie Lance, I agreed to represent him. In connection with this engagement, I was paid a $50,000 retainer in installments by Donnie's father, Jimmy Lance. Jimmy Lance also agreed to pay me $15,000 for expenses. Shortly after I was retained, Donnie was charged with malice murder, felony murder, burglary and possession of a firearm in connection with the murders of Joy Lance and Dwight Wood, Jr.

4. By December 1998, seven months in advance of trial, the retainer paid by Jimmy Lance was exhausted and Donnie's family was unable to provide me with any further compensation in connection with my representation of him. The

family had been unable to raise the $15,000 promised for expenses, so I had allocated $45,000 for fees and $5,000 for expenses. The $5,000 was virtually depleted paying for pre-trial transcripts. Donnie Lance did not have any assets to pay my fees and expenses. Accordingly, I moved the trial court for payment of my fees in connection with my representation. A hearing was held of my motion. and on December 3, 1998, the trial court found Donnie Lance to be indigent. Thereafter, I was considered court-appointed counsel.

5. At the time of Donnie's trial, I had handled four prior death cases. Three of those cases resulted in life sentences. In both cases in which the client received death, Tommy Lee Waldrip and Donnie Lance, I had negotiated sentences of life prior to the trial. For reasons particular to their cases, both Mr. Waldrip and Mr. Lance chose to proceed to trial.

6. Donnie's reason for not taking the plea was very straightforward. He stated to me from the beginning that he did not commit the crime. As I began to look at the case, I realized that the evidence against Donnie was wholly circumstantial and that there was virtually no evidence to connect him to this crime. There was no eyewitness testimony to tie him to the scene of the crime nor any forensic evidence that would link him to the scene of the crime or the murders. Although there was a footprint on the door to the crime scene and the State presented evidence that it was consistent with the same make and size of shoes once owned by

Donnie, they were unable to show that it was in fact made by Donnie or that it was made at or around the time of the murders. I believed at the time of Donnie's trial and continue to believe that Donnie Lance was not involved in the murders of Joy Lance or Dwight Wood, Jr. My trial strategy was to present any and all evidence that would support this theory.

7. I represented Donnie throughout all pre-trial, trial, post-trial, and direct appeal proceedings. Throughout my representation of Donnie, I acted as sole counsel. As the sole counsel, I was responsible for all strategy decisions, witness interviews, and all briefing and trial preparation in Donnie's case and coordinated or personally conducted all of the investigation in the case.

8. Because neither Donnie nor his family had resources to pay all of my fees or pay for a second attorney, I requested that the trial court appoint a second attorney. My request was denied. I was shocked. As I explained to the trial court, second counsel is critical in a capital case. Simply investigating and presenting the case in a straightforward capital case often requires the efforts of two counsel. The legal research necessary to insure that I was raising all potential issues on Donnie's behalf and adequately presenting those to the court was a full time job. In addition to this, I had to investigate all of the issues relevant to Donnie's innocence so that I could present substantial evidence and arguments to rebut the State's case. The demands of this case were great.

9. Although I desperately needed someone to assist me at the guilt /innocence phase of the trial, the main reason I needed a second attorney was so that I could have someone else to be responsible for the penalty phase. As I have noted, the preparation necessary to investigate and rebut the guilt / innocence phase of this case was a full time job and took all of my efforts. Additionally, in a death penalty case you should always be litigating with an eye toward the second phase, even if, as in Donnie's case, there are real guilt / innocence issues. Without a second chair, I had no way of doing that. I had very little time left to devote to investigating the penalty phase and informed the judge of my need for assistance. He was not swayed by my arguments. Because the guilt/innocence phase took all of my time, I was unable to do the necessary investigation into the penalty phase issues.

10. I also requested that the trial court provide me with funds for experts in the defense of Donnie. I knew through discovery that the State intended to use all of its resources in investigating and presenting this case, and that I would need expert assistance in many areas to insure that I could adequately rebut their case. Four weeks before jury selection, the trial court granted me $4,000 for one expert, a private investigator, to assist in investigation of the case, and denied funds for any other type of expert. This was not enough to do what needed to be done. I was desperate for some expert help. I wanted to investigate several areas of the State's case, including the ballistics, the

shoe print, the lumilite, the time of death, the finger prints, and the crime scene. I knew the State would be presenting evidence in these areas and knew I was not qualified to rebut their arguments by myself. Whatever the lawyer says is not evidence.

11. I used the court-provided funds to hire Andy Pennington, a private investigator, the only expert for whom funds were designated. I relied on Mr. Pennington to interview witnesses in the case and provide me with interview summaries. However, because we were provided with a list of over 140 witnesses only several weeks before trial and I only received the funds to hire Mr. Pennington shortly before the trial, Mr. Pennington was unable to interview many of the witnesses on the State's witness list.

12. My fears about the lack of experts became true at the trial. The State presented several witnesses who were purported experts in their fields. Because I had no funds to hire experts, I had to try to become an expert in these fields quickly. For example, I read everything I could on the lumilite prior to the trial so that I could question the witnesses who testified about it's use. I wanted to show that the State could not prove when the shoe print was deposited on the door, but had to try to do this through their witnesses as I had no witness of my own. I felt like I was in a boxing match with my hands tied behind my back. I tried to argue through the States' witness, Terry Cooper, that the deck was unfairly stacked. Cooper testified as expert in everything. He kept offering expert opinions on

matters outside of the scope of any expertise he might hold. I tried to point out through my questions and through objections that he did not have the necessary expertise, but the judge would not allow me to make these points and allowed Mr. Cooper to testify to pretty much anything he wished. Without my own experts, I had no way to counter Mr. Cooper's testimony.

13. Another impact of the judge's decision to make me try this case by myself was the sheer exhaustion I experienced. At the end of each day in court, I had to interview and prepare witnesses for the following day's testimony. I was getting by on little to no sleep. I noted this to the judge on the record. I was so tired that I was afraid I would miss something, but I had no choice but to stay up late to insure that I was prepared for the following day.

14. I did not know before I accepted the representation of Donnie that the State was going to present evidence of prior difficulties. All the Lance family had discussed with me was the crime for which Donnie was being investigated. Had I known this, I probably would have refused to take the case without the assurance of sufficient funds and additional counsel. The State introduced a wealth of evidence of prior incidents involving Donnie and Joy Lance and other prior difficulties involving Donnie and similar transactions against Donnie. To adequately counter this evidence, I needed to investigate each incident. Not only was I defending the capital case, I was in essence investigating and defending all of these

other matters. There was no way that I could adequately do this with the meager funds and assistance allocated. Because of the trial court's refusal to provide adequate funds for second counsel and for expert assistance, I did not have the funds or resources necessary to investigate the thirty plus prior difficulties that the State intended to and did introduce at trial. For example, the State presented evidence that Donnie hit a man upside the head with a gun during a fight. The evidence presented at trial on this issue made it sound like Donnie was the instigator and that he used excessive force against a relatively peaceful person. I understand from habeas counsel that there are witnesses available who were present at the fight and could have painted a much different picture of this incident for the jury. This would have been critical evidence that I would have liked to present to the jury, but I was unable to adequately investigate the prior violence due to lack of funding, expert assistance, and co-counsel.

15. The key item of evidence they had against Donnie at trial was this Diehard shoe print they purportedly found on the exterior door at the crime scene. The State's theory was that Donnie had kicked in the door and that he had then thrown out the shoes he was wearing. It was important to our case to show that there was no way they could prove when the print was placed. Also, any information I could present to show that they had not properly preserved the print or any information to show that this was a common shoe and that many different sizes of

shoe could have left this print would have been critical to our defense. Without expert assistance, I was unable to adequately investigate and present evidence to rebut this evidence. I tried to discredit it through cross examination and argument, but my questions and argument were not evidence, something the judge repeatedly pointed out to the jury.

16. The actual Crime scene provides a great opportunity to discover who committed the Crime and what actual evidence exists against the client. Although I was able to do one initial walk through of the scene, as I got more discovery from the State and a better understanding of their case, I needed to be able to go back to check the information they were providing. Donnie had no information about the crime scene because he had never been in the trailer, so I was dependent upon what I could view and what the State provided me. Much to my surprise, the mobile home was not secured by the State and was repossessed prior to trial and prior to my being able to do all of the necessary investigation in the case. The State's failure to preserve the crime scene prevented me from fully investigating the crime scene and negatively impacted my defense of Donnie.

17. Obviously another key part of the State's case was the alleged confessions Donnie had given while in jail. There is no doubt in my mind that these "confessions" were not valid. I spent quite a lot of time with Donnie and he is not a man who gives up information. I have had many clients whom I have had to advise over and over

to keep their mouths shut, but Donnie was not that person. It is and has always been my practice to remind clients very early in our relationship that the other inmates are potential witnesses against them and they should not assume that they can talk safely to them about their cases. Unfortunately, clients routinely ignore this advice. I am confident that this did not happen with Donnie. For one, he has always professed his innocence from day one of our relationship. Secondly, as I noted above, he was not someone who gave up information about anything freely.

18. I believed strongly that Frankie Shields and Morgan Thompson had received some sort of preferential treatment from the State. I filed a pretrial motion asking for any evidence of deals between the State and it's witnesses. I received nothing in return. When Mr. Shields wrote the newspaper complaining how the State had reneged on its deal, I was not surprised. Based upon everything I know about this case, I feel strongly that Mr. Shields was being truthful in his letter to the editor but not when he testified at the remand hearing.

19. Joe Moore testified that Donnie had made an inculpatory statement to him the day after the crime. I requested any and all information of any deals or negotiations with Mr. Moore. In order to properly impeach Mr. Moore, I needed to know of all meetings that he had with the prosecution and the content of those meetings. Information that he had a meeting with David Cochran at his home prior to his testimony and

that he was in contact with Mr. Cochran frequently is the type of information that I was requesting and required to adequately defend Mr. Lance. Additionally, I knew before trial that Mr. Moore had allegedly passed a polygraph test. The rules on the admission of polygraphs at a criminal trial are clear - - they are inadmissible. I presumed that the State would instruct their witness not to mention the polygraph, so I did not file a motion in limine to preclude admission of this type of information. My failure to do so was not tactical nor strategical.

20. Throughout the trial, there was chronic tension between me and Judge Motes. I cannot overstate how hostile the environment was against me in his courtroom and I do not believe the transcript can adequately show the hostility. The judge was quite friendly in our initial hearings, but became increasingly hostile to me as the pretrial hearings began. There was an undercurrent of hostility throughout the trial. I felt as though I was on the verge of being found in contempt of court throughout the trial. It's difficult to explain how different this trial was from others in which I had been counsel. I have had trials prior to this one where the judge and I did not see eye to eye. This was different. For example, at one point in the trial I was making my argument and the judge just got up and left the bench. I have never had anything like that happen in my twenty five plus years of courtroom experience. I felt like the judge was openly disparaging of my case, and felt like this

was evident to anyone in the courtroom, including the jurors.

21. The negative relationship between me and the trial court also impacted the case in other ways. After I was denied a second chair and the judge's response to my initial requests for funds, I realized that I was fighting a losing battle. As I have noted previously, I believed that the only way to adequately investigate and counter the State's case was to have my own expert witnesses. I finally quit asking for expert witnesses at Some point during the trial because I knew that any such requests would be futile, since the trial court had denied all such previous requests and virtually every one of my other motions and requests. This was not a tactical or strategical decision on my part. I wanted the experts and funding.

22. Likewise, I did not investigate or seek assistance in evaluating whether Donnie suffered from any mental disabilities or mental retardation. The trial court had refused to provide me with the necessary funds and with a second chair to investigate penalty phase. As a result of this I had been unable to investigate penalty phase. I did not think the judge would grant a request for a psychologist or psychiatrist. I had no tactical or strategical reason for not requesting these funds but simply did not do so because I believed, based upon the Court's actions thus far, that the Court would not grant the funds.

23. When penalty phase came, I had nothing to put on because I had not been able to investigate the penalty phase case. All of my resources had been utilized to rebut the State's case at guilt / innocence. The judge asked me if I was choosing not to put on any witnesses and I said yes, because it would just be more of the same. The reason I said this is because I had not been able to investigate to determine what other information existed. I understand that habeas counsel has presented evidence to this Court that Donnie Lance suffers from organic brain damage, that his mental deficits contributed to his ability to make decisions and use sound judgment, that he was a kind person who assisted others in need, that he was a loving father to his children, that many of the instances between Donnie and Joy were not as one sided as presented by witnesses, that Donnie continued to assist Joy even after they were divorced, along with a wealth of additional evidence that is consistent with my theory of the case that Donnie did not commit this crime. This is precisely the type of evidence that I wanted to present at the trial, both in the guilt phase, where relevant, and in the penalty phase. I did not present it because I had neither the funds nor the assistance to investigate it and present it.

24. I have been a criminal defense attorney for my entire career and have represented several capital defendants. I believe strongly in the right of those charged with crimes, particularly capital crimes, to a fair and adequate defense. I also take seriously my obligations to assist in

this representation. Donnie Lance's case is the case that put me over the top. After this case, I realized that I can no longer do death penalty work. It is exhausting and expensive. As a sole practitioner, it is difficult if not impossible to handle a capital case and continue to meet the needs of other clients. It is unrealistic to expect one person to represent a man charged with a capital crime. The treatment by the judge during the pretrial and trial of Donnie Lance's case was the icing on the cake.

Further affiant saith naught.

/s/J. Richardson Brannon
J. Richardson Brannon

Sworn or affirmed to me this the
13th of September, 2005.

/s/
Notary Public

My commission expires:

Notary Public, Fulton County, Georgia
My Commission Expires July 2, 2006

APPENDIX E

IN THE SUPERIOR COURT OF BUTTS COUNTY STATE OF GEORGIA

CASE NO. 03-V-0490

DONNIE CLEVELAND LANCE,	)
	)
Petitioner,	)
	)
v.	)
	)
WILLIAM TERRY, Warden,	)
Georgia Diagnostic and	)
Classification Prison,	)
	)
Respondent.	)
	)

AFFIDAVIT OF STEPHEN B. BRIGHT

COMES NOW, Stephen B. Bright, who after being duly sworn states as follows:

1. I am over the age of 18 and competent to testify to the matters set forth herein.

2. Since 1982, I have served as the Director for the Southern Center for Human Rights (the "Center"), a public interest legal project that provides representation to persons facing the death penalty and prisoners in challenges to cruel and unusual conditions

of confinement in the eleven southern states. The Center was created in 1976 to respond to the deplorable conditions in prisons and jails in the South and the United States Supreme Court's decision that year allowing the resumption of capital punishment. Since its creation, the Center has been engaged in litigation, public education, advocacy and work with other organization and individuals to protect the civil and human rights of people prosecuted in the criminal courts - particularly those facing the death penalty and confined in the prisons and jails of the South. The Center is also engaged in efforts to improve access to lawyers and the legal system by poor people accused of crimes and in prison, and to bring about greater judicial independence.

3. Prior to joining the Center, I was a Trial Attorney with the Public Defender Service in Washington, D.C. and a Legal Services Attorney with the Appalachian Research and Defense Fund in Lexington, Kentucky. I received my J.D. in 1974 from the University of Kentucky. A copy of my curriculum vitae is attached as Exhibit A.

4. I have represented persons facing the death penalty at the trial, appeal and post-conviction stages of capital cases since 1979 in state and federal courts. I argued *Amadeo v. Zant* before the U.S. Supreme Court in 1988, in which the death sentence was set aside because of racial discrimination.

5. I have testified before committees of both the U.S. Senate and House of Representatives and committees of the legislatures of Connecticut, Georgia and Texas. served on the American Bar Association's ("ABA") Task Force that studied capital punishment

issues and made recommendations, ultimately adopted by the ABA with minor modification, to the U.S. Congress about how to improve the fairness of the process by which people are sentenced to death.

6. I have authored numerous law review articles and essays and given numerous lectures regarding the death penalty. I am a Visiting Lecturer in Law at the Yale law school and have taught at the Harvard, Emory, Georgetown, Northeastern and Florida State law schools as well as the Institute on World Legal Problems in Innsbruck, Austria conducted by St. Mary's University School of Law.

7. I have received numerous awards, including the ABA's Thurgood Marshall Award in 1998, the Roger Baldwin Medal of Liberty presented in 1991 by the American Civil Liberties Union and the Kutak-Dodds Prize presented by the National Legal Aid & Defender Association in 1992.

8. As a result of my experience in representing persons facing the death penalty, I am familiar with the demands of a capital case and the number of lawyers needed to defend such a case properly. I am also familiar with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (the "ABA Guidelines"). Since the ABA Guidelines were adopted in 1989, they have required that a person facing the death penalty be represented by at least two attorneys.

9. Similarly, Georgia's Unified Appeal Procedure requires that two attorneys be appointed to represent persons facing the death penalty. Unified Appeal Rule II A. 1.

10. It is my understanding that the Petitioner in this case was represented by only one attorney at all phases of trial and sentencing. This was contrary to the ABA Guidelines and Georgia's Unified Appeal Procedure. Representation by two lawyers is one of the most fundamental, bedrock requirements of the ABA Standards for effective representation. Failure to comply with other less important standards has been the basis for a finding of ineffectiveness. *See Rompilla v. Beard,* 125 S.Ct. 2456 (2005); *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

11. Defending a capital case is an overwhelming task for a team of lawyers and investigators. In one case in which we had four lawyers on a defense team in a capital case, we all were quite busy. In my opinion, it would be virtually impossible for a single lawyer to handle effectively all aspects of a capital case. I certainly would not undertake to represent someone in a capital case without an experienced co-counsel. The Unified Appeal sets out the minimum requirements for co-counsel in a capital case, *see* Unified Appeal, Rule II, A. 1. b, but far more experience is desirable than the three years of practice and limited trial experience required by the Unified Appeal. But no co-counsel at all is unacceptable.

12. In *Ake v. Oklahoma,* 470 U.S. 68 (1985), the United States Supreme Court observed that psychiatry is not an exact science and that psychiatrists disagree widely and frequently, and held that in order for a defendant to receive a fair trial, the Constitution requires that whenever the defendant's mental health is a significant factor for the jury to consider in determining either guilt or punishment, the defendant be provided an independent mental health expert.

13. The statements set forth above are based on my personal knowledge and are true and correct to the best of my knowledge and belief.

This 23d day of August, 2005.

/s/Stephen B. Bright
Stephen B. Bright

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 23d DAY OF
August, 2005.
/s/

My Commission Expires: Notary Public,
Fayette County, Georgia
My Commission Expires
Jan. Jan. 28 2009

ATTACHMENT

STEPHEN B. BRIGHT
SOUTHERN CENTER for HUMAN RIGHTS
83 Poplar Street, N.W.,
Atlanta, GA 30303-2122
www.schr.org
404/688-1202 Fax: 688-9440 e-mail: sbright@schr.org

Director, Southern Center for Human Rights, a public interest legal project which provides representation to persons facing the death penalty and to prisoners in challenges to cruel and unusual conditions of confinement in eleven southern state, and advocates improvements in the quality of counsel for poor people accused of crimes, judicial independence and alternatives to incarceration. Responsibilities include representing individuals in capital and prisoners' rights cases, supervising capital and prisoners' rights litigation of ten-attorney staff, advocacy in various forums of the Center's criminal justice and corrections objectives, hiring all staff and administration of the Center. (September 20, 1982 to the present)

PREVIOUS LAW PRACTICE:

Trial attorney, Public Defender Service, Washington, D.C. Representation of indigent persons accused of crimes in the District of Columbia courts. (September 7, 1976 to August 20, 1979)

Legal services attorney, Appalachian Research and Defense Fund, Lexington, Ky. Representation of indigent persons in jail conditions, welfare rights

and other civil litigation. (May 6, 1975 to July 31, 1976)

ACADEMIC APPOINTMENTS:

Yale Law School, J. Skelly Wright Fellow and Visiting Lecturer in Law, 1993, 1994 & 1996; Visiting Lecturer in Law, 1995, 1998, 1999, 2000, 2002, 2003-05 (courses: capital punishment, seminar in advocacy)

Harvard Law School, Visiting Lecturer in Law, winter, 1997, 1998, 1999, 2001, 2002, 2003, 2004 (advanced criminal procedure); fall, 1994 (advanced criminal procedure, prisoners' rights and post-conviction remedies)

Emory Law School, Senior Lecturer in Law, 1998-2002; Visiting Lecturer in Law, fall, 1997 (capital punishment)

Georgetown University Law Center, Visiting Associate Professor, spring 1997 (capital punishment)

Northeastern University School of Law, Visiting Lecturer, summer, 1996 (capital punishment)

St. Mary's University School of Law, Institute on World Legal Problems, Innsbruck, Austria, Lecturer, summer, 1996 (the death penalty and international human rights)

Florida State University College of Law, Tobias Simon Scholar in Public Interest Law, spring, 1992 (one of three instructors in case on race, gender and the law)

Executive Director, District of Columbia Law Students in Court Program, Washington, D.C., a clinical program in trial advocacy for third-year law students which provides legal assistance to poor people in civil and criminal cases in the District of Columbia, operated by a consortium of the American, Catholic, George Washington, Georgetown and Howard Universities in Washington, D. C. (February 1, 1981 to September 17, 1982; supervising attorney in the criminal division of the program, August 20, 1979 to January 31, 1981)

LITIGATION EXPERIENCE:

Representation of persons facing the death penalty at trial, appeal and post-conviction stages of capital cases since 1979 in state and federal courts in Alabama, Georgia, Florida, Maryland, Mississippi and South Carolina; argued capital cases before the U.S. Supreme Court, the U.S. Courts of Appeals of the Fourth, Fifth and Eleventh Circuits and the supreme courts of Florida, Georgia, and Mississippi; representation of prisoners in federal class actions suits challenging conditions of confinement; tried numerous non· capital criminal cases as a public defender in the Superior Court of the District of Columbia.

Cases include:

Amadeo v. Zant, 486 U.S. 214 (1988) (briefed and argued before the United States Supreme Court: conviction and death sentence set aside due to racial discrimination).

Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985)(en banc), *vacated and remanded,* 478 U.S. 1016 (1986), *adhered to on remand,* 809 F.2d 700 (11th Cir. 1987) (en banc), *cert. denied,* 483 U.S. 1010 (1987) (conviction and death sentence vacated due to jury instruction which shifted burden of proof on intent)

Isaacs & Dungee v. Kemp, 778 F.2d 1482 (11th Cir. 1985), *cert. denied,* 476 U.S. 1164 (1986) (conviction and death sentence set aside due to failure to grant a change of venue)

Amadeo v. State, 384 S.E.2d 181 (Ga. 1989) (finding that "special skills are necessary to assure adequate representation in death penalty cases" and reversing refusal of trial judge to appoint counsel familiar with case due to post-conviction representation to continue representation of defendant at new trial)

Brooks v. State, 385 S.E.2d 81 (Ga. 1989) (establishing right of indigent defendant in criminal cases in Georgia to make *ex parte* application for funds for experts and investigators)

Mississippi Publishers Corp. v. Coleman, 515 So.2d 1163 (Miss. 1987) (ordering closure of pretrial proceedings in highly publicized capital case)

LAW REVIEW ARTICLES AND ESSAYS:

Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE LAW JOURNAL 1835 (1994)

Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, 1997 NYU ANNUAL SURVEY OF AMERICAN LAW 783 (1997)

Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the infliction of the Death Penalty, 35 SANTA CLARA LAW REVIEW 433 (1995)

Bright & Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases,* 75 BOSTON UNIVERSITY LAW REVIEW 759 (1995)

Political Attacks on the Judiciary: Call Justice Be Done Amid Efforts to Intimidate and Remove Judges From Office for Unpopular Decisions? 72 NEW YORK UNIVERSITY LAW REVIEW 308 (1997)

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Representation of Indigent Defendants, 92 WEST VIRGINIA LAW REVIEW 679 (1990)

Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems, 51 MIAMI LAW REVIEW 413 (1997)

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BOOK CHAPTERS:

Why the United States Will Join the Rest of the World in Abandoning Capital Punishment, a chapter in DEBATING THE DEATH PENALTY (Hugo Bedau & Paul Cassell, eds. 2004)

Capital Punishment: Accelerating the Dance with Death, a chapter in THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz, ed. 2002)

The Accused Get What the System Doesn't Pay For: Poor Legal Representation for People Who Can't Afford Lawyers, a chapter in PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR (Tara Herivel & Paul Wright, eds. 2003)

Discrimination, Death and Denial: Race and the Death Penalty, a chapter in MACHINERY OF DEATH (David R. Dow & Mark Dow, eds. 2002)

The Politics of Capital Punishment: The Sacrifice of Fairness for Executions, a chapter in AMERICA'S

EXPERIMENT WITH CAPITAL PUNISHMENT (James R. Acker, Robert M. Bohm & Charles S. Lanier, eds. 1998)

Legalized Lynching: Race, the Death Penalty and the United States Courts, a chapter in THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT (William A. Schabas, ed. 1997)

Race. Poverty and Disadvantage in the Infliction of the Death Penalty in the Death Belt, a chapter in THE MACHINERY OF DEATH published by Amnesty International (1995)

Indifference to Injustice, a chapter in FRONTIERS OF JUSTICE: VOLUME 1: THE DEATH PENALTY (Claudia Whitman & Julie Zimmerman, eds. 1997)

LECTURES AND SPEECHES:

Will the Death Penalty Remain Alive in the Twenty-first Century?: International Norms, Discrimination, Arbitrariness and the Risk of Executing the Innocent, Twelfth Thomas E. Fairchild Lecture, University of Wisconsin Law School, 2001 WISCONSIN LAW REVIEW 1 (2001)

Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights, John Randolph Tucker Lecture, Washington & Lee University School of Law, 54 WASHINGTON & LEE LAW REVIEW 1 (1997)

The Electric Chair and the Chain Gang: Choices and Challenges for America's Future, 71 NOTRE DAME LAW REVIEW 845 (1996)

The Death Penalty as the Answer to Crime: Costly, *Counterproductive and Corrupting,* 36 SANTA CLARA LAW REVIEW 1069 (1996)

Keynote Address: Capital Punishment and the Criminal Justice System – Courts of Vengeance or Courts of Justice?, presented at Conference on the Death Penalty in the Twenty-first Century sponsored by the Criminal Law Society at the Washington College of Law of the American University, 45 AMERICAN UNIVERSITY LAW REVIEW 279 (1995)

The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights, 39 ST. LOUIS UNIVERSITY LAW JOURNAL 479 (1995)

In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty, Adler-Rosecan Lecture, University of Missouri School of Law, February 14, 1992, 57 MISSOURI LAW REVIEW 849 (1992)

Other presentations on various criminal justice, corrections and public interest law topics at annual meetings of the American Bar Association, universities, meetings of professional associations, and other programs. (1976 to present)

DEBATES AND PANEL DISCUSSIONS (published):

Panel discussion, *Breaking the most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?* a discussion at the American Bar Assocaition's Annual Meeting, Atlanta, Ga., Aug. 9, 1999, published in volume 31 COLUMBIA HUMAN RIGHTS LAW REVIEW, page 123 (1999)

Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law? American Bar Association Annual Meeting, Toronto, Canada, August 3,1998, published in volume 67 FORDHAM LAW REVIEW, page 2793 (1999)

Carter Center Symposium on the Death Penalty, held at the Jimmy Carter Presidential Center on July 14, 1997, volume 14 GEORGIA STATE LAW REVIEW, page 329 (1998)

The Modern View of Capital Punishment, a debate with Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, 34 AMERICAN CRIMINAL LAW REVIEW 1353 (1997)

Panel discussion, *Reflections all a Quarter-Century of Constitutional Regulation of Capital Punishment,* The Seventh Belle R. & Joseph H. Braun Memorial Distinguished Lecture Series, 30 JOHN MARSHALL LAW REVIEW 399 (1997)

Panel discussion, *Capital Punishment: Is There Any Habeas Left in this Corps?,* annual meeting of the

American Bar Association, 27 LOYOLA UNIVERSITY OF CHICAGO LAW REVIEW 560, 569-580 (Spring 1996)

Panel discussion, *The O.J. Simpson Case and Capital Punishment,* sponsored by the Association of the Bar of the City of New York, published at 38 HOWARD LAW JOURNAL 247 (1995)

Panel discussion, *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases,* presentation at the annual meeting of the American Bar Association, 31 HOUSTON LAW REVIEW 1106, 1124 (1994)

NEWSPAPER OP-ED ARTICLES:

A Smooth Road to the Death House, NEW YORK TIMES, February 7, 2000

Executing children: Kentucky can end practice by enacting law in this session, COURIER-JOURNAL, Louisville, Ky., March 17, 2002

Hanging the Judge: Demagogues, politicians chip away at U.S. court system, ARIZONA REPUBLIC, June 6, 1997

Quality of death penalty lawyers is indefensible, N.Y. DAILY NEWS, Sept. 8, 1994

Death Sentence Lottery, THE WASHINGTON POST, July 3, 1990

Bright & Canan, *The Coppola Execution: An Unseemly Rush to Death.* THE WASHINGTON POST, August 15, 1982

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Turning Celebrated Principles into Reality, THE CHAMPION (published by the National Association of Criminal Defense Lawyers), Jan.-Feb., 2003, page 6

The Killing Machine, THE NATION, October 9,2000, page 17

Developing Themes in Closing Argument and Elsewhere, LITIGATION (the journal of the American Bar Association Section of Litigation), Fall 2000, page 40

Death Penalty Moratorium: Fairness, Integrity at Stake, American Bar Association CRIMINAL JUSTICE Magazine, Vol. 13, No.2, page 28 (Summer, 1998)

Gideon v. Wainwright at 35: Glimpses at a Dream Yet to be Realized, THE CHAMPION, March 1988

Challenging Racial Discrimination in Capital Cases, THE CHAMPION, January/February 1997

Obtaining Funds for Experts and Investigative Assistance, THE CHAMPION, June 1997

Does the Bill of Rights Apply Here Any More? Evisceration of Habeas Corpus and the Denial of Counsel to Those Sentence of Death, THE CHAMPION, November 1996

Bright, Kinnard & Webster, *Keeping Gideon from Being Blown Away; Prospective Challenges to Inadequate Representation,* American Bar Association CRIMINAL JUSTICE Magazine, Vol. 4, No. 4 (Winter 1990)

EXPERT TESTIMONY:

Expert testimony in *Quitman County v. Mississippi* on the inadequacy of the system for providing legal representation to poor people accused of crimes following remand in *State v. Quitman County,* 807 So.2d 401 (Miss. 2002)

Expert testimony on the demands on counsel in capital cases in the Court of Common Pleas of Aiken County, quoted with approval by the South Carolina Supreme Court in *Bailey v. State,* 424 S.E.2d 503, 507-508 (S.C. 1993) (holding that lawyers appointed to capital cases in South Carolina must be reasonably compensated, not limited to amount set in state statute)

Expert testimony on racial discrimination in the infliction of the death penalty before the Inter American Commission on Human Rights of the Organization of American States in *In re William Andrews.* February 22, 1996

Expert testimony on the effectiveness of counsel in *Commonwealth v. Wilson,* Circuit Court of Kenton County, Kentucky, No. 87-CR-166, decided March 5, 1997

Expert testimony on the effectiveness of counsel in *Commonwealth v. Willoughby,* Circuit Court of

Fayette County, Kentucky, No. 83-CR-00152-2, February 11, 1998

Affidavits in support of stay of execution and on review regarding obligations of counsel in capital cases, submitted by the Botswana Centre For Human Rights in *In re Ditshwanelo – Tlhabologang Maauwe and Gwara Brown Motswetla v. Attorney General of Botswana,* High Court of the Republic of Botswana, April 1999

TESTIMONY BEFORE LEGISLATIVE COMMITTEES AND COMMISSIONS

Testimony before the Committee on the Judiciary, United States Senate, regarding the Innocence Protection Act of 2001, June 27, 2001

Testimony before the Subcommittee on Crime of the Committee on the Judiciary, United States House of Representatives, regarding the Innocence Protection Act of 2000, June 20, 2000

Testimony before the United States Commission on Civil Rights on racial discrimination in the criminal justice system, April 15, 1999

Testimony before the Committee on the Judiciary of the United States Senate regarding the inadequacy of court-appointed counsel in capital cases. February 21, 1990

Testimony before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the U.S. House of Representatives

regarding proposed federal death penalty legislation and the Racial Justice Act. May 9, 1990

Testimony before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the U. S. House of Representatives regarding racial discrimination in the infliction of the death penalty. July 11, 1991

Testimony before the Committee on the Judiciary of the United States Senate in opposition to the nomination of Edward Earl Carnes to the U.S. Court of Appeals for the Eleventh Circuit. April 1, 1992

Testimony before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the U.S. House of Representatives regarding the federal habeas corpus. May 20, 1993

Testimony on capital punishment issues before committees of the Connecticut, Georgia and Texas legislatures

BOARDS AND COMMITTEES:

Advisory Committee on the Revision of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which made recommendations adopted by the ABA in February 2003 (published in 31 HOFSTRA LAW REVIEW 913 (2003)

Advisory Board, New Perimeter, an affiliate of the DLA Piper Rudnick Gray Cary LLP law firm, which provides legal support for projects of global

concern, including health care, hunger, housing, economic development, law reform and human rights (2005 to present)

Board of Directors, New World Foundation, which supports organizations working to strengthen und expand civil rights and the active participation of citizens in American democracy (2000 to present)

Board of Directors, Texas Defender Service, a non-profit, public interest legal project dealing with capital punishment in Texas (2000 to present)

Board of Directors, National Association of Criminal Defense Attorneys (1996 to 2002)

Board of Directors, Georgia Justice Project, a non-profit organization providing legal representation and other assistance to poor people charged with crimes (1999 to 2003)

Member, American Bar Association Task Force on Habeas Corpus Review of State Capital Cases (1988-89), which studied the problems of review of capital cases and made proposals and issued a report, which were adopted with minor revision by the ABA House of Delegates in February, 1991. *Toward a More Just and Effective System of Review in State Death Penalty Cases,* 40 AMERICAN UNIVERSITY LAW REVIEW 1 (1990); author of minority report on problem of inadequate legal representation and need for procedural protections, *Minority Report of Stephen B. Bright*, 40 AMERICAN UNIVERSITY LAW REVIEW at 209

Board of Directors, Texas Resource Center, a non-profit, public interest legal project which recruited attorneys and provided direct representation to persons facing the death penalty in Texas (1988-1996)

CONTRIBUTIONS TO CONTINUING LEGAL EDUCATION:

Editor and co-author, *Defending a Capital Case in Georgia* (1987 & 2d ed. 1993) and *Mississippi Death Penalty Defense Materials* (3d ed. 1987), manuals on the defense of capital cases at trial published by the Southern Center for Human Rights and made available at duplication cost to attorneys representing indigent defendants.

Presentations on capital litigation, litigating issues of racial discrimination, various trial practice topics, judicial independence and habeas corpus issues at week-long death penalty colleges sponsored by the California Attorney for Criminal Justice and California Public Defenders Association, the Kentucky Office of Public Advocacy, and the University of Michigan College of Law. Presentations at seminars and continuing legal education programs sponsored by the National Association of Criminal Defense Lawyers, the NAACP Legal Defense Fund, the National Legal Aid and Defender Association, the Florida Public Defenders Association, the District of Columbia Criminal Practice Institute, the Georgia Council of Superior Court Judges, the United States Army Trial Defense Service and other organizations.

HONORS AND AWARDS:

American Bar Association's Thurgood Marshall Award, presented at the ABA Annual Meeting, Toronto, August 1, 1998

Roger Baldwin Medal of Liberty, presented by the American Civil Liberties Union, for "extraordinary contributions to civil liberties in the United States." June 19, 1991

Kutak-Dodds Prize, presented by the National Legal Aid & Defender Association, for "extraordinary vision and inspiring leadership in the struggle against capital punishment; for his powerful advocacy on behalf of death row inmates throughout the South; and his unwavering conviction that those who face the worst penalty have a right to the best lawyers." May 6, 1992

Honorary Doctorate of Public Service, John Jay College of Criminal Justice, June 3, 2005

Honorary Doctor of Public Service, Northeastern University, May 28, 2004

Honorary Doctorate of Public Service, University of Louisville. May 11, 2002

Honorary Doctorate, University of Central England, Birmingham, United Kingdom. February 15, 2001

John Minor Wisdom Professionalism and Public Service Award, presented by the American Bar Association's Section on Litigation for "high standards of professionalism and outstanding

contribution in promoting an open profession and all open system of justice." October 24, 1991

Alumni Hall of Fame, University of Kentucky College of Law. June 14, 2000

Teaching Award presented by Yale Law Women "in recognition of your commitment to excellent teaching, mentoring and inspiring. May 2003

Ben F. Johnson Jr. Public Service Award, presented by the Georgia State University College of Law for public service exemplified by the colleges founding dean, Ben Johnson. April 10, 2003

Significant Contributions to Criminal Justice Award presented by the California Attorneys for Criminal Justice December 11, 1999

Award for Leadership in Human Rights, presented by the *Columbia Human Rights Law Review,* Columbia Law School, "for longstanding commitment" and "extraordinary commitment to the field of human rights." April 14, 1999

Brandeis Medal, presented by the Brandeis Society of the Louis D. Brandeis School of Law, Louisville, Kentucky. March 12, 1998

Henry R. Heyburn Alumni Public Service Award, presented by the University of Kentucky College of Law Alumni Association. June 17, 1998

Outstanding Leadership in the Public Interest Award, presented by the Emory Public Interest Committee, Emory Law School. February 5, 1998

Stuart Stiller Memorial Award, awarded by friends of Stuart Stiller to honor those in the legal profession who symbolize the humanity, professional excellence, compassion, humor and empathy shown by Stuart Stiller during his life. March, 1995

Minnesota Advocates for Human Rights for "enormous contribution to the defense of human rights and dignity for people on death row." April 23, 1993

Durfee Award for "significantly enhancing the human dignity of others through law," the Durfee Foundation, San Diego, California. December, 1988

BAR MEMBERSHIP:

Member of the bars of Georgia and the District of Columbia (inactive). Formerly member of the bars of Florida and Kentucky.

Also admitted to practice before the Supreme Court of the United States, the United States Courts of Appeals for the Fourth, Fifth, Eleventh and District of Columbia Circuits, and a number of federal district courts.

EDUCATION:

J.D., College of Law, University of Kentucky, Lexington, December, 1974.

B.A., Political Science, University of Kentucky, 1971.

APPENDIX F

STATE OF GEORGIA
COUNTY OF GWINNETT

Affidavit of Tona C. Harrell

1. My name is Tona Harrell. I am over the age of 18 and am competent to make this affidavit.

2. I served on the jury on the capital case of Donnie Lance v. State. We convicted Mr. Lance of the murders of Joy Lance and Butch Woods and sentenced Mr. Lance to death.

3. The decisions to convict Mr. Lance and sentence him to death was an extremely difficult and emotional one. In order to assist our deliberation, we had to ask several questions of the judge about the evidence. We also prayed together a lot and several people searched the Bible for assistance in being comfortable with our decision. I felt comfortable with our decisions to convict and sentence Mr. Lance.

4. I would have felt more comfortable with our decision to convict Mr. Lance of the murders if there had been for example, a fingerprint evidence, DNA, or a confession.

5. I have read a copy of the letter to the editor written by Frankie Shields, a man in jail with Mr. Lance who testified that Mr. Lance confessed the murders

to him. If I had known that, in fact, Frankie Shields had been given a deal to testify, and that the prosecutor had not been entirely honest about this disclosure, it would have affected my view of the state's integrity, and might have made a difference to the decision.

6. One reason we decided to go with the death penalty was the fact that the defense presented nothing to suggest that the murders were anything less than cold-blooded and planned. If the defense had presented any evidence that they were done in the heat of passion or as the result of a mutual fight or that Mr. Lance was mentally ill or mentally impaired, that might have made a difference to us.

7. The defense did not present any evidence about Mr. Lance's background or about his life. I would have wanted to hear more evidence other than about the circumstances of the crime, or about good things Mr. Lance may have done in his life. The defense did not really give us a reason not to sentence Mr. Lance to death. If any of this kind of evidence had been presented, our decision at the penalty might have been different.

8. The jury discussed what a sentence of Life Without Parole meant. We were given specific instructions on what each sentence meant. It was our understanding that if given a Life Without Parole sentence, Mr. Lance would be parole eligible at some point.

Further affiant sayeth naught.

/s/ _____
Tona Harrell

Sworn and subscribed
to me on this, the
23rd day of October, 1999

/s/ Laura M. Berg _____
Notary Public

LAURA M. BERG
Notary Public Fulton County, Georgia
My Commission Expires Nov 23, 2001

APPENDIX G

State of Maryland)
) ss.
County of Montgomery)

AFFIDAVIT OF THOMAS M. HYDE, M.D., Ph.D.

Personally appeared before the undersigned officer duly authorized by law to administer oaths, Thomas M. Hyde, M.D., Ph.D, who being duly sworn or affirmed, states as follows:

1. I, Thomas M. Hyde, M.D., Ph.D, am over eighteen years of age. This affidavit is made upon my personal knowledge, and I am competent to testify to the matters set forth herein. My address is REDACTED, Chevy Chase, Maryland, 20815, and my telephone number is (301) 652-8777.

2. I am a licensed and Board Certified physician who specializes in Behavioral Neurology.

3. My educational background is as follows: I received a Bachelor of Arts and Sciences in Biology in 1978 from University of Pennsylvania. I received my M.D. from the University of Pennsylvania in 1984. I completed a General Medical Internship in 1985 at the University of Pennsylvania Medical Center, Presbyterian, and Residency in Neurology at Stanford University Medical Center in 1987. I

was the Chief Resident in Neurology at Stanford University Medical Center from 1987 through 1988.

4. After completion of my residency, I was the Director of Neurology Consultation Services for the Clinical Brain Disorders Branch of the National Institute of Mental Health at St. Elizabeths Hospital in Washington, D.C. I was also a Special Volunteer at the Laboratory of Neuropathology for the Clinical Brain Disorders Branch of the National Institute of Mental Health.

5. At present time, I am employed as a private practitioner in Behavioral Neruology, as well as an investigator in the Neuropathology Section for the Clinical Brain Disorders Branch of the National Institute of Mental Health at St. Elizabeths Hospital in Washington, D.C. Since 1990, I have also held the position of Clinical Instructor in the Department of Neurology at George Washington University Medical School in Washington, D.C. In 1990, I received board certification in Neurology from the American Academy of Neurology.

6. I am a member of several professional organizations, including the American Medical Association, the Society for Neuroscience, the American Academy of Neurology and the Society of Biological Psychiatry. I also have numerous published works pertaining to neurology, psychiatry and biological areas of study and research. I have been qualified and have testified as an expert witness in the field

of neurology in civil and criminal cases in the state courts of Maryland, Florida, and Georgia, and in the federal courts. A copy of my curriculum vitae is attached as Appendix "A".

7. I was asked by counsel for Donnie Cleveland Lance to perform a neurological consultation and evaluation of Mr. Lance. I evaluated Mr. Lance on April 20, 2005, at the Georgia Diagnostic and Classification Prison in Jackson, Georgia, where Mr. Lance is incarcerated pursuant to a sentence of death.

8. In addition to my evaluation of Mr. Lance, I reviewed background records including, but not li,ited to: Georgia Supreme Court opinion - Lance v. State, 275 Ga. 11, 560 S.E. 2d 663 (2002); Chronology of Events relevant to Mr. Lance's life and the crime; Birth Certificate of Donnie Lance - REDACTED, 1953; Marriage Certificate of Donnie Lance and Joy Love - Sept. 7, 1984; Jefferson City Schools - elementary school records of Donnie Cleveland Lance; Jefferson City Schools - high school records of Donnie Cleveland Lance; high school diploma of Donnie Cleveland Lance; Lanier Area Vocational Technical School records for Donnie Cleveland Lance; Northeast Georgia Medical Center records for Donnie Lance - Mar. 28, 1993; Georgia Regional Hospital at Augusta medical records for Donnie Lance - Jan. 2004; Summary of Interview of Donnie Lance by Special Agent R.W. Wheeler & JSCO investigator David Cochran - Nov. 9, 1997.; Interview of Donnie Lance by Special Agent R.W. Wheeler & JSCO investigator David

Cochran - Nov. 9, 1997.; Summary of Interview of Donnie Lance by Special Agent Wes Wheeler & JSCO inv. David Cochran - Nov. 11, 1997.; Interview of Donnie Lance by Special Agent Wes Wheeler & JSCO inv. David Cochran - Nov. 11, 1997; Domestic Violence "diaries" written by Joy Lance's family; Records of Medical Examiner Dr. Frederick E. Hellman re: autopsies of Dwight Wood.,Jr., and Joy Lance; Pretrial Testimony of Joe Moore - Sept. 29, 1998 -pp. 214-228; Trial Testimony of Joe Moore - June 1999 - pp. 1054-1131; Interview of Joe Moore by JCSO Inv. David Cochran, D.A. Tim Madison and Sheriff Stan Evans - Dec. 4, 1997; GCIC of Donnie Lance; Department of Corrections File re: Donnie Cleveland Lance; Witness Affidavits (Barbara Brookshire; Brenda Langford; Elaine Watson; Fannie Lance; Gary Watson; Gene Funderburk; Hazel Funderburk Nix; Jimmy Langford; Jimmy C. Lance; John Lance; Joyce Lance; Marty Lance; Rhonda Funderburk Bruce; Walter Tonge; David Brookshire, Calvin Gooch, M.C. Gooch, Larry Gooch, Danny Hollis, James Lance, Greg Lance, Jerry Lance, Stephanie Lance, Tony McNeal, Billy Pruitt, Harold Underwood, Carolyn Waters, Joan Williamson); Trial Transcripts - Volumes IV-X; Transcripts from Remand Hearings - 4/13/00, 6/5/00, 2/23/01; Transcripts from Pretrial Hearing dates 8/25/98, 9/18/98 (2 parts), 10/2/98, 11/9/98; Neuropsychological testing of Dr. Ricardo Weinstein.

Relevant History:

9. The patient has a significant history of traumatic loss of consciousness. A series of car accidents were noted through clinical interview with the patient, review of background records and witness testimony, and discussions with psychiatrist David Pickar who conducted an additional clinical examination of Mr. Lance. The patient, who drove race cars prior to his incarceration, experienced several wrecks at the race track, including at least two incidents which resulted in a loss of consciousness and one experience which resulted in embedded glass fragments in the patient's forehead. Additional car accidents were experienced by the patient off of the race track. The patient reports during his senior year of high school where the car he was driving flipped several times and then came to rest. The driver's door had been torn off, the car was on fire, one passenger had shoulder injuries, and one passenger had a broken leg. The patient reports being momentarily stunned by the impact of the wreck.

10. The patient was hit in the head with a lug wrench during an altercation at the race track.

11. The patient has a significant history of alcohol abuse. He had no treatment for alcohol abuse. He states that alcohol abuse never interfered with his functional status. The patient has experienced black outs as a result of alcohol consumption.

12. In March of 1993, the patient suffered an apparent gunshot wound to the head. The bullet entered the left occipital region of the head and remains lodged in the patient's neck. The patient was treated in the emergency room for this injury and released against medical advice following treatment.

13. The patient reports that when he first awoke following the gun shot wound, he attempted to stand up but was too queasy and dizzy to do so. He eventually was able to contact relatives by telephone who then notified medical authorities. The patient reports that the dizziness remained with him for 6 to 9 months after the gun shot wound. The patient reports that the dizziness was experienced both when he attempted to get up quickly and also when he attempted to look up. For example, the patient reported that a few weeks prior to his arrest he was attempting to work on a pickup truck in his shop, but experienced dizziness when standing in the pit and looking up at the underside of his truck. The patient reports that he still experiences the dizziness when he attempts to look up.

14. The patient reports problems with his vision which began when he was shot and have continued since that time. The patient reports that he was unable to see sideways for several months following the injury, and that it appeared as if he was viewing everything through a tunnel. The patient reports that he presently suffers blurred vision. The present vision problems are described as looking through a shade.

15. The patient reports difficulty with memory following the gunshot wound to his head. The patient reports that he had great difficulty remembering anything at all for the first few days following the injury and that these memory problems persisted on a milder level for several months. The patient reports that he had difficulty remembering names of common items in the weeks following the injury.

16. The patient has suffered severe headaches since the gunshot wound to his skull in 1993. These headaches are confirmed by prison record and by witness testimony Mr. Lance reports the headaches begin in the left occipital region of the brain and then move around the head into both temples. The pain from the headaches is described as a million needles moving in and out of the skull.

17. The patient has a small scar on the left occipital region of the skull as the result of a gunshot wound to the head in March of 1993. Although the wound is healed, the patient reports that the scar still sometimes scabs over and leaks fluid.

18. The patient has received treatment for depression and anxiety, both prior to and during his incarceration.

Summary:

19. By history and examination, Donnie Lance suffered a traumatic brain injury (TBI) in March of 1993 when he received the gunshot

wound to the head. TBI, also called acquired brain injury or simply head injury, occurs when a sudden trauma causes damage to the brain. TBI can result when the head suddenly and violently hits an object, or when an object pierces the skull and enters brain tissue. Symptoms of a TBI can be mild, moderate, or severe, depending on the extent of the damage to the brain. A person with a mild TBI may remain conscious or may experience a loss of consciousness for a few seconds or minutes.

20. Symptoms of mild TBI include headache, confusion, lightheadedness, dizziness, blurred vision or tired eyes, ringing in the ears, depression, fatigue or lethargy, a change in sleep patterns, behavioral or mood changes, and trouble with memory, concentration, attention, or thinking. Posttraumatic headaches, the most common symptom, usually resolve with time, and may take up to one year to resolve. In more severe cases, post traumatic headaches do not resolve and continue for extended periods of years.

21. Closed head injuries involve a significant blunt force trauma and a rapid deceleration which cause the brain to strike the inside of the skull. Unconsciousness results from a lack of blood now to the brain, and will eventually result in brain damage and then death if the individual is not resuscitated or does not resuscitate. Both the closed head injury and the lack of oxygen to the brain can cause organic brain damage and contribute to cognitive impairment.

22. The frontal lobes are extremely vulnerable to injury due to their location at the front of the cranium, proximity to the sphenoid wing and their large size. MRI studies have shown that the frontal area is the most common region of injury following mild to moderate traumatic brain injury.[1]

23. By report and history, in addition to the TBI from the gunshot wound, the patient also sustained repeated mild brain injuries through a series of car accidents. Repeated mild brain injuries that occur over an extended period of time, such as months or years, can result in cumulative neurologic and cognitive deficits. Some conunon disabilities include problems with cognition (thinking, memory, and reasoning), sensory processing (sight, hearing, touch, taste, and smell), communication (expression and understanding), and behavior or mental health (depression, anxiety, personality changes, aggression, acting out, and social inappropriateness).

24. Individuals with frontal lobe dysfunction display impaired insight and learning abilities, and are more prone to impulsive behaviors., and evidence a lack of appropriate judgment in social and other situations, particularly when the external stimuli are suddenly changed.

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[1] Levin et al. (1987). Magnetic resonance imaging and computerized tomography in relation to the neurobehavioral sequelae of mild and moderate head injuries. Journal of Neurosurgery, 66, 706-713.

25. It is my professional opinion, to a reasonable degree of scientific and medical certainty, that Mr. Lance suffers from significant impairments to the frontal lobe. The frontal release sign seen in the physical examination is consistent with frontal lobe dysfunction. It is my professional opinion, based upon the records and data reviewed, that Mr. Lance's frontal lobe injuries were acquired through a series of closed head injuries.

26. I have reviewed the affidavit of Dr. Ricardo Weinstein. Mr. Lance's tests results on the neuropsychological examinations administered by Dr. Weinstein are consistent with the neurological history I have reviewed and are consistent with my observations and evaluation of Mr. Lance. I concur with Dr. Weinstein's conclusions concerning Mr. Lance's mental state and the impact it may have had upon his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

FURTHER AFFIANT SAITH NOT.

/s/ _____
THOMAS M. HYDE, M.D., Ph.D.

Sworn to or affirmed and subscribed before me this 13th day of September, 2005.

/s/ _____
Notary Public

CIRA PARISH, JR.

NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires November 15, 2008

APPENDIX A

Thomas Michael Hyde, M.D., Ph.D.
Suite 233, 4701 Willard Avenue,
Chevy Chase, Maryland, 20815
301-652-8777.

PERSONAL INFORMATION:

Date of Birth:	REDACTED, 1957
Place of Birth:	Toronto, Ontario, Canada
Citizenship:	United States of America
Marital Status:	Single
Residence:	REDACTED, Chevy Chase, Maryland 20815
Telephone:	(301) 652-8777
Social Security Number:	REDACTED-9348

PROFESSIONAL EDUCATION AND EXPERIENCE:

1974-1978	B.A., Department of Biology, College of Arts and Sciences, University of Pennsylvania, Philadelphia, Pennsylvania.
1978-1984	M.D., School of Medicine, University of Pennsylvania, Philadelphia, Pennsylvania.
1978-1984	Ph.D., Graduate Group in Anatomy, Faculty of Arts and Sciences, University of Pennsylvania, Philadelphia, Pennsylvania.

1984-1985	General Medical Internship, Department of Medicine, Presbyterian-University of Pennsylvania Medical Center, Philadelphia, Pennsylvania.
1985-1987	Neurology Residency, Department of Neurology, Stanford University Medical Center, Stanford, California.
1987-1988	Chief Resident in Neurology, Department of Neurology, Stanford University Medical Center, Stanford, California.
1990	Board Certification in Neurology, American Academy of Neurology.

EMPLOYMENT AND APPOINTMENTS:

1988-1996	Director, Neurology Consultation Services, Clinical Brain Disorders Branch, National Institute of Mental Health, St. Elizabeths Hospital, Washington, D.C.
1988-1996	Special Volunteer, Laboratory of Neuropathology, Clinical Brain Disorders Branch, National Institute of Mental Health, Washington, D.C.
1996-present	Staff Scientist, Neuropathology Section, Clinical Brain Disorders Branch, National Institute of Mental Health, IRP, NIH, Bethesda, Maryland

1990-present	Clinical Instructor, Department of Neurology, George Washington University Medical School, Washington, D.C.

AWARDS AND HONORS:

1974	Valedictorian Magruder Senior High School Rockville, Maryland
1974-1978	Dean's List University of Pennsylvania Philadelphia, Pennsylvania
1976-1984	University Scholar School of Medicine and Graduate Group in Anatomy University of Pennsylvania
1977	Phi Beta Kappa University of Pennsylvania
1978	B.A. Summa cum Laude University of Pennsylvania
1978	Grass Foundation Research Award Graduate Group in Anatomy University of Pennsylvania
1979-1984	Predoctoral Fellow Medical Scientist Training Program School of Medicine and Graduate Group in Anatomy University of Pennsylvania

1983	Roy G. Williams Award for Excellence in Research School of Medicine and Graduate Group in Anatomy University of Pennsylvania
1984	Outstanding Clinician-Researcher in Senior Class School of Medicine and Graduate Group in Anatomy University of Pennsylvania
1999	National Institutes of Health Director's Award National Institutes of Health Bethesda, Maryland

PROFESSIONAL ASSOCIATIONS:

Society for Neuroscience
American Medical Association
American Academy of Neurology
District of Columbia Medical Society
Society of Biological Psychiatry

RESEARCH FUNDING:

1989-1991	National Alliance for Research on Schizophrenia and Depression Young Investigator Award
1989-1991	Tourette Syndrome Association Independent Research Grant

ADDITIONAL ACTIVITIES:

1990-1993	Volunteer, Whitman-Walker Clinic, AIDS Testing Section
1992	Member, Program Committee, Winter Conference on Brain Research
1992-1995	Chairman, Radiation Drug Research Committee, Neuroscience Research Center, National Institute of Mental Health
1993-1994	Member, Montgomery County, Maryland AIDS Task Force
1993-1995	Member, Program Committee, Annual Meeting of the American Academy of Neurology
1993-1994, 1998-2000	Member, Program Committee, Annual Meeting of the Society of Biological Psychiatry
1995-1997	Member, Board, Epilepsy Foundation for the National Capitol Area
1998-present	Member, Advisory Board to Board of Directors, Greater Washington Chapter, Tourette Syndrome Association
1999-2002	Member, Board of Directors, Winter Conference on Brain Research

2000-present Member, Editorial Advisory Board, Journal of Chemical Neuroanatomy

2004-present Member, Editorial Advisory Board, Current Psychiatry Reviews

2002-2003 Member, Program Committee, Winter Conference on Brain Research

PUBLICATIONS:

ORIGINAL RESEARCH PUBLICATIONS:

1. Hyde, T.M. and R.R. Miselis. Effects of area postrema/caudal medial nucleus of the solitary tract lesions on food intake and body weight. American Journal of Physiology. 244: 577-587, 1983.

2. Hyde, T.M. and R.R. Miselis. Effects of area postrema/caudal medial nucleus of the solitary tract lesions on water and sodium balance. American Journal of Physiology. 246: 173-182, 1984.

3. Miselis, R.R., T.M. Hyde, and R.E. Shapiro. The area postrema and adjacent solitary nucleus in water and energy balance. Federation Proceedings. 43: 2969-2971, 1984.

4. Hyde, T.M., M. Gibbs, and S.J. Peroutka. Distribution of muscarinic cholinergic receptors in the dorsal vagal complex and other selected nuclei in the human medulla. Brain Research. 447: 287-292, 1988.

5. Hyde, T.M. and S.J. Peroutka. Distribution of cholecystokinin receptors in the dorsal vagal complex

and other selected nuclei in the human medulla. Brain Research. 495: 198-202, 1989.

6. Hyde, T.M., J.R. Hotson, and J.E. Kleinman. Differential diagnosis of choreiform tardive dyskinesia. Journal of Neuropsychiatry and Clinical Neurosciences. 3: 255-268, 1991.

7. Hyde, T.M., B.A. Aaronson, C. Randolph, K.C. Rickler, and D.R. Weinberger. The relationship of birthweight to the phenotypic expression of Tourette's Syndrome in monozygotic twins. Neurology. 42: 652-657, 1992.

8. Hyde, T.M., J.C. Ziegler, and D.R. Weinberger. Psychiatric disturbances in metachromatic leukodystrophy: insights into the neurobiology of psychosis. Archives of Neurology. 49: 401-406, 1992.

9. Egan, M.F., T.M. Hyde, G.W. Albers, A. Elkashef, R. Alexander, A. Reeves, A.O. Blume, and R.J. Wyatt. Treatment of tardive dyskinesia with vitamin E. American Journal of Psychiatry. 149: 773-777, 1992.

10. Hyde, T.M. and R.R. Miselis. The subnuclear organization of the human caudal nucleus of the solitary tract. Brain Research Bulletin, 29: 95-109, 1992.

11. Egan, M.F., T.M. Hyde, D.L. Tirschwell, J.E. Kleinman, and D.R. Weinberger. Laterality of appendicular tardive dyskinesia in chronic schizophrenia. Biological Psychiatry. 31: 1098-1109, 1992.

12. Hyde, T.M., L.C. Wu, I.B. Krasnov, S.K. Sigworth, N.G. Daunton, and F. D'Amelio. Quantitative autoradiographic analysis of muscarinic cholinergic and $GABA_A$ (benzodiazepine) receptors in the forebrain of rats flown on COSMOS 2044. Brain Research. 593: 291-294, 1992.

13. Hyde, T.M., E.K. Fitzcharles, and D.R. Weinberger. Age-related prognostic factors in the severity of illness of Tourette's Syndrome in monozygotic twins. Journal of Neuropsychiatry and Clinical Neurosciences. 5: 178-182, 1993.

14. Randolph, C., T.M. Hyde, J.M. Gold, T.E. Goldberg, and D.R. Weinberger. Tourette's, Syndrome in monozygotic twins: relationship of tic severity to neuropsychological function. Archives of Neurology. 50: 725-728, 1993.

15. Goldberg, T.E., T.M. Hyde, J.E. Kleinman, and D.R. Weinberger. The course of schizophrenia: neuropsychological evidence for a static encephalopathy. Schizophrenia Bulletin. 19: 797-804, 1993.

16. Gupta 5., M.F. Egan, and T. M. Hyde. An unusual presentation of tardive dyskinesia with prominent involvement of the pectoral musculature. Biological Psychiatry. 33: 291-292, 1993.

17. Elkashef, A.M., M.F. Egan, J.A. Frank, T.M. Hyde, B.K. Lewis, and R.J. Wyatt. Basal ganglia iron content in tardive dyskinesia: an MRI study. Biological Psychiatry. 35: 16-21, 1994.

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19. Ohuoha, D.C., M.B. Knable, S.S. Wolf, J.E. Kleinman, and T.M. Hyde. 5-HT_3 receptor distribution in the human nucleus of the solitary tract and other structures of the caudal medulla: a quantitative autoradiographic study. Brain Research. 637: 222-226, 1994.

20. Sambunaris, A. and T.M. Hyde. Stroke-related aphasias mistaken for psychotic speech: two case reports. Journal of Geriatric Psychiatry and Neurology. 7: 144-147, 1994.

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23. Hyde, T.M., H.A. Emsellem, C. Randolph, K.C. Rickler, and D.R. Weinberger. EEG abnormalities in monozygotic twins with Tourette's Syndrome. British Journal of Psychiatry. 164: 811-817, 1994.

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long-term haloperidol decanoate. Brain Research Bulletin 38: 355-363, 1995.

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with chronic haloperidol. Psychopharmacology. 150: 260-263, 2000.

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dorsolateral prefrontal cortex of schizophrenics and controls. Schizophrenia Research. 48: 361-363, 2001.

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APPENDIX H

COUNTY OF JACKSON)
) ss.
STATE OF GEORGIA)

AFFIDAVIT OF JIMMY LANCE

Personally appeared before me the undersigned officer duly authorized by law to administer oaths **JIMMY LANCE,** who being duly sworn or affirmed, states as follows:

1. My name is Jimmy Lance, and I am over the age of eighteen and competent to testify as to the matters set forth in this affidavit. I live at REDACTED, Pendergrass, Georgia, 30567, and my phone number is (706) 693-4541.

2. Donnie Lance is my only son.

3. I grew up in Pendergrass in Jackson County, Georgia. My family (the Lances) has lived here for generations, just like the Watson, Martin and Love families. Lots of us are kin to each other after so many years. Pendergrass is a small community where everyone knows everyone else. It has grown a lot here since when I grew up here or when Donnie was growing up. We now have two stop lights in Pendergrass and I know that is amazing to some people but it is actually so much bigger

than it used to be that I am constantly shocked at how much

* * *

7. I know they said at his trial that he admitted he had killed Joy to some of the guys in jail with him. I don't believe that at all. There's no way that Donnie would have told some guys he didn't know something like that. It just wouldn't happen.

8. Just like Donnie didn't fuss when he was a kid, he didn't complain once he was a man. Even after he got shot in the head he didn't try to get whoever did it. I wanted him to. I thought whoever did it should have to answer to it, but Donnie wouldn't even tell me who it was that did it. I tried to get him to tell, but he wouldn't. I figured it was Joy but Donnie never said that to me. I couldn't believe he would protect someone who had shot him, but that's what he did. It was like it was against his code or something. He just didn't believe in telling on other people. He kept anyone else's business just as private as he kept his own.

9. Donnie was different after he got shot in the head. He said he was fine, but he started acting even more quiet than he usually did. For a while after it happened he told me he had trouble getting up in the morning because he was dizzy and all. And he started getting real bad headaches, which he never had before. He said the dizziness and the headaches made it harder for him to work on the cars.

10. I was worried about Donnie from the minute he didn't stay overnight at the hospital when he was shot because it didn't seem like he was there long enough for them to tell how bad it really was. You see Donnie has never been one to go to the doctor. Donnie is afraid of hospitals and does not always go to the doctor when he should. If I ever mentioned to him he should go to a doctor about something or the other, he would tell me that he didn't like doctors and he figured that would just make his problem, whatever it was at the time, worse.

11. I didn't want Donnie to leave the hospital when he was shot but he told me he had to because he had no insurance and because he just didn't like doctors. He'd just been shot in the head and I really thought he should stay. After he got out is when he started complaining about the headaches. I knew Donnie's headaches must be really bad because he was never one to complain or take medicine but he sure did complain and take medicine for headaches after he got shot.

12. Donnie has wrecked his car many times and did not go to the doctor when I thought he should have. I can remember one particular accident where Donnie wrecked and he had glass from the rearview mirror in his forehead. I didn't see the wreck but I did see the glass in his forehead after. He told me he had been knocked out cold when he

* * *

APPENDIX I

County of Lexington)
) ss.
State of South Carolina)

Affidavit of Sheila Lance Oliver

Comes now the affiant, Sheila Lance Oliver, who after being duly sworn or affirmed by an officer authorized by law to administer oaths, swears and states the following:

1. My name is Sheila Oliver. I am over eighteen years of age. This affidavit is made upon my personal knowledge, and I am competent to testify to the matters set forth herein.

2. I live at REDACTED, Irmo, SC 29063-7990. My telephone number is 803-749-4003.

3. Donnie Lance is my older brother. Our parents are Doris and Jimmy Lance. There were four children in our family: Joan, Donnie, myself and Barbara. We are all about 1 ½ years apart, so Donnie and I are close in age. We were all born in Georgia and lived the mjority of our childhood in the small town of Pendergrass. Joan mved to Texas with her husband, but the rest of the fmnily have stayed in Pendergrass. I stayed in Pendergrass until 1996 and I now live in South Carolina.

4. When we were little, we lived in a small house on Wayne Poultry Road. It originally only had two bedrooms. My parents slept in one room and the children slept in another. My father later built on to the house and made it larger, and Donnie was able to have his own room.

* * *

softball game in Gainesville that day and they called and told me Donnie had been shot. I called Joy and talked to her that day although I am not sure if I was the first to tell her he had been shot. That day when I spoke to Joy she sounded nervous and weird. I remember thinking she knew something about the whole thing but myself and the family decided to be quiet and let the law take care of it. No one was ever charged with doing it, but we all knew it was Joy and Butch. Donnie told me he didn't want to push it because he didn't want to see Joy locked up. He told me that if he pushed it and she got locked up, the children wouldn't have their mother and that would not be a good thing.

26. After Donnie was shot in the head, he began having horrible headaches. I can remember him telling me that he would get headaches that would start where the bullet went in and then just spread around his head. Donnie was never one to take medicine or see a doctor. None of us in the family are the type to take medicine actually but after Donnie got shot he began to take medicine for his headaches so you knew they had to be bad. Donnie was not one to even

say he had a headache or was sick. Donnie just was quiet and never complained so when he did begin comlplaining about his head after he got shot it scared me. From what he said, the headaches were not everyday but they were often.

27. The weekend the crime occurred I was in Atlanta for a wedding with my husband. I arrived at my father's home around 4:00 p.m. Sunday afternoon. About 10 to 15 minutes after I arrived Donnie showed up. He had a look of disgust on his face. I

* * *

APPENDIX J

AFFIDAVIT OF RICARDO WEINSTEIN, Ph.D.

Personally appeared before me, the undersigned officer duly authorized to administer oaths, Ricardo Weinstein, Ph.D., who, after being duly sworn or affirmed, states as follows:

I, Ricardo Weinstein, declare as follows:

1. I am a psychologist licensed to practice in the State of California. My office address is 1202 Quail Gardens Court. Encinitas, California 92024, telephone (760) 753-1890.

PROFESSIONAL BACKGROUND AND QUALIFICATIONS

2. I received a Ph.D. in Clinical Psychology from the International College in Los Angeles, California, and received a Post-Doctoral Certificate in Neuropsychology from the Fielding Institute in Santa Barbara, California. am a member of the National Academy of Neuropsychology, American Neuropsychiatric Association, International Neuropsychological Society, and Division 41 of the American Psychological Association. My practice areas include clinical, neuropsychological, and forensic psychology. I am eligible for board certification by the American Board of Professional Neuropsychology.

3. I currently am in private practice in San Diego, California, where I specialize in clinical and forensic Neuropsychology. In addition to maintaining a private practice, I am a member of the San Diego County Superior Court panel of approved psychologists for criminal court referrals.

4. I have served as an adjunct professor at San Diego State University, and worked as a consultant in the Comer Program in elementary public schools for over eight years. I frequently lecture on issues of psychology and neuropsychological assessment as well as child abuse and neglect. I have lectured extensively in the areas of drug abuse and suicide prevention and Quantitative electroencephalography. I have presented papers on issues of neuropsychology and neuropsychological assessment at national and international scientific meetings and conferences, and have published articles on topics in neuropsychology in peer-reviewed journals. I have qualified as an expert witness in the field of neuropsychology in federal court and in state courts in California, Washington, Florida and Arizona. No court has ever failed to qualify me when I have been offered as an expert witness. I have conducted court-appointed neuropsychological evaluations in California, Washington, Oregon, Arizona, New Mexico, and Florida.

5. Throughout my practice, I have conducted more than 3,000 neuropsychological and/or psychological forensic assessments.

6. I was asked by counsel for Mr. Donnie Lance to conduct a neuropsychological evaluation in order to determine his neuropsychological functioning and/or any cognitive and neuropsychological deficits he may exhibit.

MATERIALS UTILIZED IN EXAMINATION

7. For the purpose of my evaluation I reviewed the extensive materials provided by Mr. Lance's counsel that included the following:

a. Lance v. State, 275 Ga. 11, 560 S.E. 2d 663 (2002)
b. Chronology of Events
c. Birth Certificate of Donnie Lance - REDACTED, 1953
d. Marriage Certificate of Donnie Lance and Joy Love - Sept. 7, 1984
e. Jefferson City Schools - elementary school records of Donnie Cleveland Lance
f. Jefferson City Schools - high school records of Donnie Cleveland Lance
g. High School diploma of Donnie Cleveland Lance
h. Lanier Area Vocational Technical School records for Donnie Cleveland Lance
i. Northeast Georgia Medical Center records for Donnie Lance - March 28, 1993
j. Georgia Regional Hospital at Augusta medical records for Donnie Lance - Jan. 2004
k. Summary of Interview of Donnie Lance by Special Agent R.W. Wheeler & JSCO

investigator David Cochran- Nov. 9, 1997 - 6 pp.

l. Interview of Donnie Lance by Special Agent R.W. Wheeler & JSCO investigator David Cochran- Nov. 9, 1997 - 70 pp.

m. Summary of Interview of Donnie Lance by S/A Wes Wheeler & JSCO inv. David Cochran - Nov. 11, 1997 - 1 p.

n. Interview of Donnie Lance by S/A Wes Wheeler & JSCO inv. David Cochran - Nov. 11, 1997

o. Domestic Violence "diaries" written by Joy Lance's family

p. Records of Medical Examiner Dr. Frederick E. Hellman re: autopsies of Dwight Wood, Jr., and Joy Lance

q. Pretrial Testimony of Joe Moore - Sept. 29, 1998 - pp. 214-228

r. Trial Testimony of Joe Moore - June 1999 - pp. 1054-1131

s. Interview of Joe Moore by LCSO Inv. David Cochran, D.A. Tim Madison and Sheriff Stan Evans - Dec. 4, 1997 - 31 pp. + 1 p. summary

t. GCIC of Donnie Lance

u. Department of Corrections File re: Donnie Cleveland Lance
   - i. GDCP Mental Health Records
   - ii. GDCP Medical Files
   - iii. GDCP Inmate File

v. Affidavit of Barbara Brookshire

w. Affidavit of Brenda Langford

x. Affidavit of Elaine Watson

y. Affidavit of Fannie Lance

z. Affidavit of Gary Watson

aa. Affidavit of Gene Funderburk

bb. Affidavit of Hazel Funderburk Nix
cc. Affidavit of Jimmy Langford
dd. Affidavit of Jimmy C. Lance
ee. Affidavit of John Lance
ff. Affidavit of Joyce Lance
gg. Affidavit of Marty Lance
hh. Affidavit of Rhonda Funderburk Bruce
ii. Affidavit of Walter Tonge
jj. Affidavit of David Brookshire
kk. Affidavit of James Lance
ll. Affidavit of James "Greg" Lance
mm. Affidavit of Billy Pruitt
nn. Affidavit of Tony McNeal
oo. Affidavit of Larry Gooch
pp. Affidavit of Jerry Lance
qq. Affidavit of Stephanie Lance
rr. Affidavit of M.C. Gooch
ss. Affidavit of Calvin Gooch
tt. Affidavit of Sheila Oliver
uu. Affidavit of Clay Oliver
vv. Affidavit of Joan Williamson
ww. Affidavit of Harold Underwood
xx. Trial Transcripts - Volumes IV-X
yy. Transcripts from Remand Hearings - 4/13/00, 6/5/00, 2/23/01
zz. Transcripts from Pretrial Hearings, dates 8/25/98, 9/28/98 (2 parts), 10/2/98, 11/9/98.

8. I also personally interviewed several members of Mr. Lance's family, including Jimmy C. Lance (father), Barbara Brookshire (sister), Irene Lance (step-mother), Edna Lance (aunt) and Carolyn Whitlock (first cousin). I visited the homes of Jimmy C. Lance and Edna Lance, and visited the shop on Donnie Lance's property

where he worked on cars. The home, where Mr. Lance lived prior to his incarceration and during his marriage to Joy Lance, was also located on this property but was burned to the ground by relatives of Joy Lance following Mr. Lance's conviction.

9. The materials upon which I have relied are those typically and reliably used by members of my profession for the purpose of performing a comprehensive neuropsychological portrait of a patient.

10. I interviewed and tested Mr. Lance on April 5, 6, and 7, 2005, and June 28, 2005, for a period of approximately 15 hours at the Georgia Diagnostic and Classification Prison in Jackson, Georgia.

11. In the course of my evaluation of Mr. Lance, I conducted a clinical interview and administered a series of tests and procedures in order to assess Mr. Lance's neuropsychological functioning. I conducted each test in strict compliance with the protocol set forth for its administration. I am professionally qualified, through extensive training and practical experience, to administer and interpret each of the tests employed in my evaluation of Mr. Lance and my qualifications satisfy the guidelines for examiners which were promulgated by the developers of each test.

12. Mr. Lance was cooperative and diligent in all the tasks that were required of him during the testing process. His effort appeared quite

sincere. The results of this evaluation are considered a valid and accurate representation of Mr. Lance's present neuropsychological functioning.

13. The following assessment techniques were utilized in my evaluation and diagnosis of Mr. Lance: Records Review; Clinical Interview; Mental Status Examination; Soper Neuropsychological Mental Status Examination; Wechsler Adult Intelligence Scales, Third Edition, (WAISIII); Wechsler Memory Scales, Third Edition, (WMSIII); Ruff 2 & 7 Selective Attention Test; Wide Range Achievement Test, Third Edition (WRAT3); Test of Memory Malingering, (TOMM); Rey 15 Item Test; Rey Complex Figure Drawing; Halstead-Reitan Neuropsychological Battery: Category Test, Trails A & B, Category Test, Tactual Performance Test (TPT), Grip Strength, Test Finger Tapping Test; Delis-Kaplan Executive Function System, (D-KEFS): Trail Making Test, Verbal Fluency Test, Design Fluency Test, Color-Word Interference Test, Sorting Test, Tower Test, Proverb Test; Wisconsin Card Sorting Test; Quantitative Electroencephalogram (QEEG).

HISTORY OF PRESENTING PROBLEM

14. Mr. Lance was convicted of two counts of malice murder, one count of burglary, one count of possession of a firearm during the commission of a crime and two counts of possession of a firearm by a convicted felon in 1999. He was

sentenced to death on both counts of murder. He is presently undergoing appeals process.

SUMMARY

15. This results on the neuropsychological and neurophysiological tests demonstrate that Mr. Lance's executive functioning skills, indicative of complex decision making abilities, information processing skills, judgment, and reasoning abilities, are profoundly impaired. It is my professional opinion to a reasonable degree of psychological certainty that Mr. Lance's results on this testing demonstrates significant organic brain dysfunction and cognitive impairment

RELEVANT SOCIAL AND DEVELOPMENTAL HISTORY

16. A detailed picture of Mr. Lance's social and developmental history is provided in the records and testimony referenced above. I have relied upon this information in reaching my conclusions. I have included a brief summary of these records.

17. Donnie Lance was born on REDACTED, 1953, in Athens, Georgia, to Jimmy and Doris Lance. He had an older sister, Joan. Subsequently two younger sisters, Sheila and Barbara were born. The children are all about one and one half years apart in age. Donnie's father worked in a chicken plant and, other than some brief jobs, his mother stayed at home with the children.

18. When Donnie was about three years old, the family moved to a home on Wayne Poultry Road, in Pendergrass, Georgia. Pendergrass is a small unincorporated town that covers just a few square miles and today has a population of less than 500 people. When the Lance family moved there in the mid 1950s, it was even more sparsely populated. Much of Donnie's extended family lived in Pendergrass, and because of the size of the town, most everyone living there knew each other. The town is mainly comprised of a few families, the Lances, the Funderburks, the Loves and the Watsosn.

19. Donnie's childhood was a fairly typical and non eventful childhood. He played mostly with his sisters and with neighborhood friends. Family describe him as a quiet, non aggressive child. As the only boy in the family he was often at the mercy of his sisters, but reports indicate that the four children did and do have good relations with each other. The family lived in a small two room house, and although there was not a lot of money, basic needs were met. Donnie's father ultimately built an additional room on the house so that when Donnie was in the eighth grade he was able to get his own bedroom.

20. From an early age, Donnie demonstrated a passion for cars. His father worked on cars in his spare time and Donnie quickly became interested in helping. By the time he was in high school, he had fully adopted his father's interest and spent most of his time with older boys because they were the ones with the cars. He started building and driving his own race

cars, both on a dirt track and on a paved track, and this was his main interest until his incarceration on the present case.

21. When Donnie moved out of the family home, he remained on Wayne Poultry Road in Pendergrass. He has property across the street from his father's home, where he lived and where he built his shop. He also had a small dirt track on the property where he and his friends raced go carts. His shop became a hang out for his friends and they would often stay up there until the late hours of the night, working on cars, driving go carts, and drinking.

22. Joy Love, Donnie's wife, was a friend of his sisters before she became his girlfriend. She and her family, who also lived on Wayne Poultry Road in Pendergrass, attended the Pond Fork Baptist Church were Donnie attended with his family. Joy frequently spent the night at the Lance home with one of Donnie's sisters, Sheila Lance, when they were young and up into their teens. Joy got married when she was 16 years old to Ricky Stancile, but this marriage lasted only a few years, after which Joy and Donnie began dating. Joy moved in with Donnie in 1978, and they were married on September 7, 1984. Their two children, Stephanie and Jesse, were born in 1985 and 1989.

23. Joy and Donnie's relationship has been characterized as normal and loving by some people, and abusive by others. In any event, there was a significant amount of testimony

presented at trial concerning incidents of abuse allegedly committed by Donnie against Joy.

24. Donnie is described by witnesses as a loving and attentive father to his children. Both children continue to visit him every other week while he is on death row.

25. Donnie began drinking alcohol when he was in high school and continued until his arrest. His drink of choice is Boone's Farm Country Qwencher in the summer and vodka in the winter. Self report and witness testimony indicate that Donnie drank almost on a daily basis, often starting in the early afternoon and ending at bedtime. He reports occasional blackouts from drinking. He has never sought nor received treatment for alcoholism. Witness reports and documentary evidence indicate that the physical altercations with Joy usually occurred when Donnie was under the influence of alcohol.

26. Donnie suffered many head injuries as a teenager and as an adult. He was in frequent car accidents, both at the race track and off the track. In fact, several of Donnie's wrecked cars still remain at his shop. What is likely the most significant insult to Donnie's brain occurred in March of 1993 when he was shot by unknown assailants. No one was ever arrested or convicted of the crime although a police report made by Donnie indicates that one of the perpetrators was Joy Lance.

27. In 1992, Joy began having an affair with Dwight "Butch" Wood who was at that time married to Towana Moore Wood. Donnie and Joy ultimately got divorced in August of 1993. Donnie began dating Towana Wood after that period. In addition to the incident where Donnie was shot in March of 1993, there were several instances of violence between the parties in the case, including but not limited to a fight between Joy and Towana and a shooting into the trailer of Donnie by Butch. Even after their divorce, Joy Lance frequently moved back into Donnie's home. When Joy wanted to move, Donnie would ask Towana to leave. Joy moved back and forth between Donnie's house, Butch's house and her parents' house during the years preceding her death,

28. Court records and witness testimony indicate that both Joy and Butch began using methamphetamine in the early 1990s. This drug use became a source of conflict between Joy and Donnie.

29. Donnie has received treatment for depression and anxiety both prior to his incarceration and while in prison.

30. On November 8/9, 1997, Butch and Joy were killed in Butch's home. Mr. Wood was shot in the back and Ms. Lance was bludgeoned to death with what is believed to be the butt of a gun. Donnie Lance was subsequently arrested for these murder and then convicted and sentenced to death.

NEUROPSYCHOLOGICAL TESTING

31. Mr. Lance was administered the Wechsler Adult Intelligence Scale - 3d Edition (WAIS-III), the standard examination for assessing intellectual functioning in adults. The WAIS III consists of a series of sub-tests which assess an individual's verbal and performance IQ, as well as verbal comprehension abilities, visual-perceptual organization abilities, working memory, and visual motor speed/visual scanning accuracy.

32. Mr. Lance obtained a verbal IQ score of 76 (Mean of 100, standard deviation of 15), placing him in the borderline range of functioning, and a performance IQ of 84, in the low average range of functioning, resulting in a standard full scale score of 78. This score places him in the 7th percentile for his age peers and suggests that he is generally functioning within the borderline range of intellectual abilities.

33. Mr. Lance's scores on tests of verbal reasoning place him within the borderline range and within the 5th percentile for persons his age. The subtests indicate that he is functioning in the borderline range for general knowledge (Information - 5th percentile), his knowledge of words (Vocabulary - 9th percentile), concept formation and abstract verbal reasoning (Similarities - 9th percentile), social awareness (Comprehension - 5th percentile), and working memory (Letter-number sequencing - 9th percentile). He is functioning in the low average range in tests of distractibility and numerical

reasoning (Arithmetic - 16th percentile) and immediate auditory recall and freedom from distraction (Digit span - 16th percentile).

34. Mr. Lance's performance skills were moderately higher, placing him within the low average range on all but one of the subtests. His ability to pay attention to fine detail was in the low average range (Picture completion - 16th percentile), as was his visual-motor coordination, motor and mental speed (Digit symbol-coding - 25th percentile). Examination of his spatial perception and visual abstract processing indicated he functions within the low average range (Block design - 16th percentile), as does examination of his ability for visual analysis and spatial reasoning (Matrix reasoning - 37th percentile), and sequential, logical thinking (Picture arrangement - 16th percentile). An examination of his visual perception indicated that he is functioning within the borderline range (Symbol search - 9th percentile).

35. Index scores were as follows: Verbal Comprehension - 76 (5th percentile); Perceptual Organization - 86 (18th percentile); Working Memory - 80 (9th percentile); Processing Speed - 84 (14th percentile). There were significant differences, at the .05 level, between Verbal Comprehension and Perceptual Organization. which is consistent with a history of head injuries and supportive of a finding of neuropsychological abnormalities

36. Mr. Lance's learning and memory functioning were evaluated using the Wechsler Memory Scale - 3rd Edition (WMS III). The WMS III tests visual and verbal memory, both immediate and delayed recall, as well as working memory, which is essentially a person's ability to hold information in mind while manipulating it. Mr. Lance's scores placed him within the low average range of six of the eight subtests. Specifically, he tested at low average in auditory immediate (scaled score - 16; 23d percentile); visual immediate (ss - 14; 10th percentile); immediate memory (ss-30; 12th percentile); and visual delayed (ss- 15; 14th percentile). Mr. Lance's general memory (ss-42) and working memory (ss-16) are also both in the low average range of functioning (both 21st percentile). Mr. Lance scored in the average range on auditory delayed (ss-18; 34th percentile) and auditory recognition delayed (ss-9; 37th percentile).

37. The primary sub-test scores on the WMS III indicate that Mr. Lance is operating at the 5th to 8th grade level in most areas, with a few areas in the 9th and 10th grade level. The scores on the WMS III are consistent with the scores achieved by Mr. Lance on the WAIS III.

38. Mr. Lance was also administered the Wide Range Achievement Test - 3d Edition (WRAT-3) which is a test of an individual's level of spelling, reading and arithmetic. Mr. Lance's scores on the WRAT-3 were commensurate with his IQ scores. The examination placed him at

the 5th grade level for reading, 6th grade level for spelling, and high school level for arithmetic.

39. On the Wisconsin Card Sorting Test (WCST), a measure which assesses the ability to form abstract concepts, to maintain and to shift sets, and to utilize feedback, Mr. Lance completed only 3 categories out of 6, and committed 61 perseverative errors. Although the WCST is used primarily to assess perseveration and abstract thinking, it is also considered a measure of executive function because of its sensitivity to frontal lobe dysfunction. The WCST requires the patient to realize that the correct sorting principle changes without warning and tests perseverance. Perseverance is the inability to reason to a solution in the face of a new solution - it is the tendency to relapse to a model that worked previously instead of adjusting and reasoning in reaction to changing circumstances.

40. Mr. Lance's score pertaining to perseveration errors vastly exceeds the threshold for impairment. Mr. Lance's results on the WCST indicate significant organic impairment of the frontal lobe. The frontal lobe controls his ability for strategic planning, organized searching, utilizing environmental feedback to shift cognitive sets, directing behavior toward achieving a goal, and modulating impulsive responding.

41. The Category Test is a test of general functioning and abstract reasoning. This test, which is a sensitive test for brain dysfunction,

attempts to measure the patient's concept formation ability by requiring the patient to deduce the rules which govern inclusion by items within a category, Mr. Lance committed 100 errors out of 208, which placed him at 2 standard deviations below the mean on this test and in the 2d percentile of his age peers. Mr. Lance's results on this examination indicates severe brain dysfunction and is consistent with the results on the WCST.

42. The Tactual Perception Test (TPT) provides a measure of manual dexterity, spatial memory, tactile discrimination, as well as psychomotor problem solving ability while blindfolded, Without using vision the patient must place differently shaped blocks into a flat wooden puzzle board using the dominant, non-dominant, and both hands. The time to complete each of these tasks serves as a score and their sum gives the TPT-Total Time (TPT-T) score. Afterward, the subject is asked to recall the shape and location of the blocks. These yield TPT-Memory (TPT-M) and TPT-Localization (TPT-L) scores.

43. Mr. Lance's results are significant at all levels. He achieved TPT-L score of 2, a TPT-M score of 3, and a TPT-T of 24.6 minutes. The Halsted-Reitan neuropsychological batteru, of which the TPT is a part, has an impairment index ranging from 0 to 3, with 3 indicating the highest level of impairment. Mr. Lance's scores on each of these 3 tests are 3s, the most significant level.

44. Mr. Lance was administered the Rey Complex Figure Drawing test which analyzes visual spatial ability, visual memory and organization, visual motor planning, and systematic employment of copy and recall strategies. Mr. Lance did poorly on this examination, demonstrating poor attention to visual detail, poor motor control, and poor understanding of proportion and use of space. The results of this examination are indicative of damage to the frontal lobe controlling visual spatial ability. The Rey Figure is also a test of non-verbal abilities, and Mr. Lance's results on this test and are consistent with the test results on other examinations testing the verbal parts of the frontal lobe.

45. The Facial Recognition test tests the right parietal area of the brain function. Mr. Lance achieved a score of 38 on this test, placing him in the moderately impaired range of brain functioning. His results on this examination are very poor, particularly for someone who does not have an acute condition. Persons with an acute condition, i.e. when the brain is not healed, typically score within the moderately to severely impaired range.

46. On the StreetTest, another test of right brain function, Mr. Lance got 7 out of 13 answers correct. The result on this examination is not acute, but does show some level of impairment of the right brain.

47. Mr. Lance was administered a series of tests from the Delis-Kaplan Executive Function

System (D-KEFS). The D-KEFS assesses key areas of executive function (problem-solving, thinking flexibility, fluency, planning, deductive reasoning) in both spatial and verbal modalities. The Trailmaking test is a test of frontal lobe functioning. Mr. Lance's score of 7 (M=10) on Condition 4: Number-Letter Switching, is 1 standard deviation off of norm and is a sign of brain dysfunction. Mr. Lance showed similar difficulties on the Verbal Fluency test where he received a scaled score of 2 (M=10) on the Category Switching: Total Switching Accuracy and a scaled score of 5 (M=10) on the Category Switching: Total Correct Responses. His difficulties on these examinations testing switching is evidence of an inability to shift his perceptual set to conform to changing demands.

48. Mr. Lance does much better on the Design Fluency test which is consistent with other examination showing he does better on performance than verbal in general.

49. Significant deficits were observed on the Color Word Inference test, which is another test of the ease by which a person changes his actions and perceptions when faced with evolving data. Mr. Lance's ability to articulate a less dominant response while suppressing a competing predominant response was shown to be strikingly impaired (D-KEFS Color-Word Interference Test, Inhibition). Mr. Lance's scaled score of 4 (Mean = 10) on the Inhibition subtest is two standard deviations (S.D. = 3) below the norm. Likewise, Mr. Lance's

performance on the inhibition/switching subtest (S.S. = 7; 1 standard deviation below norm) showed significant deficits when there is an increased demand for cognitive flexibility. Mr. Lance also evinced difficulties on the color naming (S.S. =7, 1 standard deviation below norm) portion of the test. These results point to the inability of Mr. Lance to be flexible, to suppress stimuli and allow competing information to take prominence and is symptomatic of frontal lobe dysfunction.

50. On the Sorting test, a measure of abstraction and problem solving skills, Mr. Lance's results indicate deficits in these areas. On condition 1: Free Sorting, Mr. Lance's scaled score of 7 is one standard deviation off of the norm. His results on Condition 2: Sort recognition, were more significant, wherein he achieved a scaled score of 5, 2 standard deviations off of the norm. The Combined Description Score of 6 is an consistent with his results on other examinations showing deficits in his executive functioning.

51. Mr. Lance does well on the Tower Test, with a scaled score of 9 (M=10).

52. The Proverbs test measures an individual's verbal abstraction skills. This test is similar in design to the Similarities sub-test on the WAIS-III and tests the same skills. Mr. Lance scores on the free inquiry portion of the test, wherein he received a scaled score of 5, indicate problems with abstract reasoning, and denotes that Mr. Lance is very concrete in his thinking.

Mr. Lance does above average on the multiple choice portion of the test, obtaining a scaled score of 18. Mr. Lance's results on this test are consistent with the results he achieved on the similarities sub-test of the WAIS-III.

53. Mr. Lance's results on the Ruff 2 &7, a test of attention - cognitive ability are not significant. This is where you have charts of numbers, and you mark as many 2s and 7s as possible within 14 seconds. You are scored by the number of hits and errors you make. Mr. Lance tested in the 58th percentile on speed and in the 50th percentile on accuracy.

54. Mr. Lance was administered the Finger Tapping and the Grip Strength test to determine if there was any significant difference between his performance using his right hand and his performance using his left hand. There was less than a 10 percent difference on the Finger Tapping test, which is not considered significant. Although Mr. Lance's results in the Grip Strength test are greater than 10 percent difference (45 kg on his right hand, 32.5 kg on his left hand), the difference in scores are reflective of Mr. Lance having broken his arm in the past and not of central nervous system dysfunction.

55. When conducting forensic examinations, an examiner must be aware and prepared for the possibility that the subject will malinger on the test and purposefully perform poorly on an examination to appear to be of lower intelligence. The TOMM is a test designed to

detect the malingering of memory problems. It also assists in determining the effort that the subject makes during the testing process. Mr. Lance recalled correctly 50 out of 50 items in both trials of the test indicating a good effort and the lack of intention to exaggerate any memory problems.

56. Mr. Lance was also administered the Rey 15 Item Memory test, a test used to evaluate potential for malingering in memory. Mr. Lance remembered 12 out of 15 items (over 9 is considered valid), indicating good effort and no malingering. I also compared Mr. Lance's results on the various tests to discover the existence of any evidence of malingering. The internal consistency (obtaining similar scores in similar tasks) which Mr. Lance demonstrated in the test results also negates the possibility that he was malingering and evinced no indication that Mr. Lance was attempting to test at a lower level than his true mental abilities allowed. Thus, the results of the evaluation are considered valid and reliable. There were no indications of feigning or malingering and Donnie Lance made a concerted effort in all tasks requested.

NEUROPHYSIOLOGICAL TEST RESULTS

57. The Quantitative Electroencephalogram (QEEG) is a neurophysiological measure of brain functioning and is a tool to assist in determining which areas of the brain are engaged and processing efficiently. The standard EEG provides the bases for the QEEG.

The full results of the QEEG are contained in the attached report. The findings from this study are consistent with the neuropsychological evaluation results.

SUMMARY AND CONCLUSIONS:

58. Neuropsychological testing demonstrates that Mr. Lance suffers from generalized and diffuse brain dysfunction. The test results indicate clear compromises in frontal lobe functions. The frontal lobe areas are responsible for the executive functions of the brain. Frontal lobe dysfunction, such as that suffered by Mr. Lance, manifests in impaired social judgment, impulsivity, inability to appropriately interpret feedback from the environment, impaired judgment, and the inability to adequately reprocess information and change course when faced with evolving facts. In addition to orchestrating basic reasoning and planning skills, the frontal lobes are critical in modulating and integrating other facets of behavioral and cognitive output.

59. Mr. Lance tests in the borderline range of intellectual functioning. School records indicate that Mr. Lance's intellectual functioning as a child and teenager were within the normal range. There is no evidence in the materials that I have reviewed indicative of deficits in adaptive functioning before the age of 18, so a diagnosis of mental retardation manifesting before the age of 18 is not supported. The IQ scores are considered a valid reflection of Mr. Lance's intellectual functioning at this time. It

is my professional opinion, to a reasonable degree of psychological certainty, that Mr. Lance's borderline intellectual functioning is as a result of the repeated insults to the brain suffered by Mr. Lance primarily as an adult. It is further my professional opinion that these brain injuries all occurred prior to the crime in question, and that the IQ test scores received in these examinations are an accurate reflection of Mr. Lance's IQ now and at the time of the crime.

60. Mr. Lance has suffered numerous injuries to the brain, the most significant of which was a gunshot to the left occipital region of the skull. These injuries, as reported in medical records and testimony, are sufficient to cause brain dysfunction and cognitive impairments such as that seen in Mr. Lance.

61. Mr. Lance has a history of physical alterations with his former wife. As noted previously, Mr. Lance's brain dysfunction is manifested in poor judgment with serious limitations in his capacity for abstract reasoning and in difficulty controlling his impulse. Couple this brain dysfunction with alcohol, and the likelihood of inappropriate behavior and the inability to adequately react to stressful or difficult situations is vastly increased. It is my professional opinion, to a reasonable degree of psychological certainty, that Mr. Lance's brain dysfunction and alcohol use contributed to Mr. Lance's improper behavior toward Ms. Lance prior to the crime.

62. Mr. Lance maintained his innocence to me throughout our meetings and I take no position on the question of Mr. Lance's guilt or innocence. My conclusions are based upon my examination of Mr. Lance, interviews with family members, and a review of the files and records listed above. My opinions with respect to Mr. Lance's mental state, if he committed the crime, do not change if he did not commit the crime. My conclusions simply state that if he did do it, his mental impairments would have impacted his behavior and actions.

63. Based on the evaluation performed, materials reviewed and my professional experience it is my opinion to a reasonable degree of psychological certainty that Donnie Lance suffers from organic brain dysfunction and impaired cognitive abilities. It is further my opinion, to a reasonable degree of psychological certainty, that these impairments would have negatively impacted Mr. Lance's ability to conform his conduct to the requirements of the law on the night of the crime. It is my professional opinion that, if Mr. Lance committed this capital felony, he was under the influence of extreme mental and emotional disturbance. Finally, it is my professional opinion, to a reasonable degree of psychological certainty, that the brain dysfunction suffered by Mr. Lance would have been significantly exacerbated by the alcohol intoxication on the night of the crime.

FURTHER AFFIANT SAITH NOT.

This the 29 day of August, 2005.

/s/
Ricardo Weinstein, Ph.D.

Sworn to or affirmed and subscribed before me this ____ day of ____, 2005.

_____
Notary Public

My commission expires:

State of California
County of San Diego
Subscribed & sworn to (or affirmed)
before me this 29 day of AUG, 2005
by RICARDO WEINSTEIN, proved to
me on the basis of satisfactory evidence
to be the person(s) who appeared before me

/s/

[SEAL] A. VASVANI
Comm. #1506303
NOTARY PUBLIC - CALIFORNIA
San Diego County
My Comm. Expires August 8, 2008

SKIL
TOPOMETRIC REPORT
Reporting Facility:
Ricardo Weinstein, Ph.D.

Report Date	4/14/05
Report Prepared By:	R. Weinstein, Ph.D.
Referred by	Beth Wells, Esq.

CLIENT INFORMATION:

Name:	Donnie Lance
Gender:	Male
Handedness:	Right Handed
Date Of Birth:	REDACTED/53
Age:	51

Medications:

None 36 hours prior to recordings.

Reason For Study:

Comprehensive evaluation of brain functioning.

History:

Mr. Lance was convicted of multiple murders. He was sentenced to death and is awaiting appelate proceedings.

RECORDING INFORMATION:

Montage = FP1 FP2 F7 F3 FZ F4 F8 T3 C3 CZ C4 T4 T5 P3 PZ P4 T6 O1 O2

Methodology

A fitted electrode cap with leads placed according to the International 10/20 System was applied to achieve a standardized 19 channel Neuronavigator EEG recording. A referential montage was obtained with linked earlobes. Electrode impedance of less then 5 Kohms was required at all sites prior to the initiation of recording. EEG signals were fed directly to a quantitative topographic analysis system where they were digitized at a rate at or above 512 samples per second. The data were band-pass filtered between 1 and 30 Hz and stored on a hard disk for subsequent analysis.

The client was seated in a chair placed approximately 2.0 meters in front of a video monitor screen. A series of standardized tests, each lasting approximately 3.5 minutes, was administered. These included 1) 2 eyes closed, 2) 2 eyes open, 3) reading for comprehension, and 4) a math test. The total recording time was over 20 minutes.

Digitized data were subjected to a custom automatic artifact detection program that identified and deleted eye-blink and movement artifact. This was supplemented by a visual review of the record for removal of residual undetected eye and head movement artifact, as well as muscle activity of potential consequence to the analysis. A manual cursor was used to selectively identify and delete only those brief segments affected. Atypical transients in the EEG signal were noted for subsequent analysis during this procedure.

Corrected EEG data were then analyzed for frequency content using the Fast Fourier Transform. Evaluation of these data employed various descriptive and statistical displays with a variety of frequency band formats. These included data tables, spectral maps, individual frequency band topometric analysis (providing both within and between state evaluation), topographic maps, and covariance analysis. Statistical analysis compared subject data with an adult normative database corrected for significant time-of-day variations and state transitions. Data also were evaluated for percentage change across states and compared with a nonnative database for state modulation. Finally, topographic maps showing covariance between all sites at relevant frequencies were compared with a normative database to evaluate the status of functional cortical interactions.

Findings:

The data obtained is of good quality, valid and reliable allowing for proper quantitative analysis. The following findings were obtained:

1) There is a dominant frequency at 10-11 hz with low amplitude at approximately 6 uV. There is attenuation and symmetry. There is slow activity in the frontal region. (Fig 1, 2,3)

2) Topometric distribution shows deviations in the frontal-temporal regions of the brain approximating 2 standard deviations from the mean when compared to the normative sample, with poor attenuation with engagement. The

reliability of the data is demonstrated by the similarity between replications. (Fig 4,5)

3) Comodulation analysis between sites shows a pattern of hypo cross-correlation between sites in the frontal areas of the brain when compared to the statistical sample. There is a pattern of right-left dissociation. This condition is present during eyes closed and engagement. A right-left dissociation has been identified with acquired brain dysfunction. (Fig 6,7)

* * *

APPENDIX K

County of Collin)
) ss.
State of Texas)

Affidavit of Joan Williamson

Comes now the affiant, Joan Williamson, who after being duly sworn or affirmed by an officer authorized by law to administer oaths, and states the following:

1. My name is Joan Williamson. I am over eighteen years of age. This affidavit is made upon my personal knowledge, and I am competent to testify to the matters set forth herein. I live at REDACTED, Dallas, Texas 75287-7545, and my telephone number is 972-713-9745.

2. I am the oldest child of Doris and Jimmy Lance and Donnie Lance is my younger brother. We were both raised in Pendergrass, Georgia. Our parents' families have lived in this area for many years. My mother was one of 9 children and my father was one of 7 children, so mostly everyone around here knew us and we knew mostly everyone else.

3. There are four children in our family – me, Donnie, Sheila, then Barbara. We are all about a year and a half apart, like stairsteps. We lived in Athens when we were real little then when I

was in the first grade, we moved to Wayne Poultry Road in Pendergrass, Georgia. Wayne Poultry is a big busy two lane paved road now, but when we moved there it was just a gravel road and was very quiet. My father's parents were still alive then and lived right up the road from us. Donnie and I and the others would often ride our bikes up to see my grandparents. Of course you couldn't do that now because of the cars, but back then there was hardly any traffic and people didn't drive that fast down the road.

* * *

10. I remember learning that Joy was having an affair with Butch Wood. I don't remember now how I learned it. I didn't know Butch Wood at all. Not surprisingly, Donnie and Joy ended up getting divorced.

11. It seems like it was around the time they got divorced that Donnie got shot in the head. The family called me and told me as soon as it happened. Of course I was scared. At first, when I heard he had been shot, I didn't know if he would get better or die or what. Even after he got better, I have worried about him having that bullet in his head. After he got shot, Donnie began having awful headaches. He would mention them when we would speak on the phone. He was not a big one for talking so he never gave many details. He would just say that he was still having trouble with the headaches. Donnie was never one to admit that anything hurt or to complain so I knew when he began

complaining about his head that it must be really bad.

12. After Donnie and Joy got divorced, he started dating Butch Wood's wife Towana. He and Joy also got back together several times. I know this because I would call to talk to him and sometimes Towana would be there and sometimes Joy would be there. When Joy wanted to move back in, Donnie always let her. I had heard from people that Joy was using drugs and then heard that stuff from Mildred, so I talked to Donnie about it. I did not think it was a good idea for him to have her living there if she was using drugs. He told me that he had even found drugs on her. I felt like it was my job to convince him to get her to leave. I told him that the drugs would get him into trouble. I told him that if she ever got caught with drugs at home he would go to jail too. I was worried too about them getting hurt if she was doing drugs because of the kind of people she would be

* * *

APPENDIX L

David Pickar, MD
Psychiatry and Clinical Neuroscience

6500 Seven Locks Road
Suite 220
Cabin John, Maryland 20818

PSYCHIATRIC EVALUATION

Per request of counsel, this examiner performed a psychiatric assessment of Donnie Cleveland Lance. I interviewed Mr. Lance at the Georgia Diagnostic and Classification Prison in Jackson, Georgia on July 15, 2005. Furthermore, I reviewed extensive background records which are listed at Appendix A attached to this document.

Background and Relevant History

Mr. Donnie Lance is presently incarcerated under two sentences of death following his convictions for two counts of malice murder, one count of burglary, one count of possession of a firearm during the commission of a crime and two counts of possession of a firearm by a convicted felon in 1999.

Mr. Lance, a 52 year old white male, was born in Athens, Georgia and was reared in Pendergass, Georgia. From an early age, Mr. Lance was involved in building and driving race cars. Mr. Lance married Joy Love in 1978 and they had two children. The

tumultuous marriage to Joy Love ended in divorce. Joy and her boyfriend Dwight "Butch" Wood were killed in Mr. Wood's home in November, 1997. Mr. Lance was convicted of these murders. Mr. Lance has asserted his innocence since his arrest.

Mr. Lance has a history of alcohol abuse for which he has never received treatment. There is no significant history of substance abuse.

Mr. Lance has a history of multiple, clinically significant traumas to the head. These include a series of car accidents which on at least two occasions, as reported by Mr. Lance, resulted in loss of consciousness. The most significant head injury, documented in detail by medical records, occurred in 1993 when Mr. Lance was shot in the head by unknown assailants. The bullet entered the left occipital region of the head and to this day remains lodged in the patient's neck. The injury was associated with relatively prolonged loss of consciousness, subsequent confusion, dizziness and headache. The patient was released from emergency care against medical advice. Dizziness, headache and blurred vision were near continual for months after the injury and occur intermittently to the present time.

Medical documents and prison records report that the patient has a documented history of anxiety, irritability and depression for which he has received mental health treatment. Mr. Lance has most recently been treated with the antidepressant fluoxetine (Prozac) 20 mg/day and with the antidepressant/ hypnotic, trazodone 200 mg/day. Prison records report a diagnosis of Depression, Not Otherwise Specified (NOS) - 311.0. Prison records also report persistent

chronic headaches associated with the gunshot wound to the head in 1993.

Clinical Interview

Mr. Lance presented as a well nourished, cooperative man appearing his stated age. He was oriented to time, place and person. His affect was flat; his speech was simple but coherent. His memory was grossly intact, although he reports memory difficulties on a day to day basis. There was no evidence of psychosis, including neither delusions nor hallucinations. Motor behavior was normal. There was some question about whether the patient could understand proverbs, some of which had to be repeated or simplified. The patient admitted to low to moderate levels of depression; he did not cry. He appeared mildly anxious. The patient did not appear to be exaggerating nor inventing symptoms, but rather he attempted to put on the best presentation with regarding to cognitive impairments.

Neuropsychological and Neurological Findings

Neuropsychological testing was performed by Dr. Weinstein and neurological examination performed by Dr. Hyde. Neuropsychological testing was highly significant in two areas: 1) poor intellectual function with broad evidence for impaired cognitive function; and 2) impairment specifically of frontal lobe function.

Mr. Lance demonstrated a significantly impaired level of intellectual function. His full scale IQ of 78 places him in less than the 10 percentile category of functioning; verbal IQ places him in the borderline mental retardation range. Although there are no "premorbid" test scores before the gunshot to the head,

it is highly probable that the head trauma produced significant damage to multiple functional aspects of the brain as reflected by his present low IQ levels, impaired memory and overall pattern of cognitive dysfunction. High school and early personal records do not suggest an individual with this degree of intellectual impairment. People who function at a level of "borderline mental retardation" are almost universally identified in school.

Performance on the Wisconsin Card Sort Test was highly notable for high numbers of perseverative errors, a strong indicator of impairment of frontal lobe function. Neurological examination by Dr. Hyde revealed frontal lobe release signs, a further indicator of frontal lobe dysfunction. Based upon my examination of Mr. Lance, my review of the background records and witness reports, and the testing of this examiner and Drs. Hyde and Weinstein, it is my professional opinion that the gunshot wound to the head, compounded by multiple previous head injuries, is causative of the neuropsychological and neurological findings of impaired intellectual and frontal lobe function.

Summary and Conclusions

It is with a high degree of medical certainty that I conclude that Mr. Donnie Cleveland Lance suffers from neuropsychiatric deficits related to serious head trauma. Psychiatric symptoms of anxiety and depression are common after head injury and have been well documented. It is my professional opinion, based on my interviews with Mr. Lance and considering all of the background data, that the following diagnoses are appropriately assigned:

Dementia Due to Head Trauma (294.1)

Depression Not Otherwise Specified (311.0).
It is further my professional opinion, to a reasonable degree of medical certainty, that these neuropsychiatric impairments existed in Mr. Lance at the time of the murders for which he is presently incarcerated.

This neuropsychiatric dysfunction has significant implications for Mr. Lance's behavior at the time of the murders for which he is sentenced to death. Given the level of Mr. Lance's frontal lobe dysfunction, it is my psychiatric opinion that Mr. Lance has now and had at the time of the crime, serious difficulties and limitations in planning and organizing events. Deficits of the type experienced by Mr. Lance cause increased impulsivity, which is intensified by the lack of moderating effects of a fully intact level of brain function. Intellectual impairment as a "marker" of damage to the brain is often associated with impulsivity, irritability or other difficulties in managing feelings and behavior. Change in situation, expectation or environment are particularly difficult for an individual with frontal lobe dysfunction such as is documented in the case of Mr. Lance. The damage to Mr. Lance's central nervous system and related neuropsychiatric dysfunction significantly impair Mr. Lance's ability to control his impulses and appropriately moderate his behavior.

Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/
David Pickar, MD

APPENDIX A

1. Lance v. State, 275 Ga. 11, 560 S.E. 2d 663 (2002)
2. Chronology of Events relevant to Mr. Lance's life and the crime
3. Birth Certificate of Donnie Lance - REDACTED, 1953
4. Marriage Certificate of Donnie Lance and Joy Love - Sept. 7, 1984
5. Jefferson City Schools - elementary school records of Donnie Cleveland Lance
6. Jefferson City Schools - high school records of Donnie Cleveland Lance
7. High School diploma of Donnie Cleveland Lance
8. Lanier Area Vocational Technical School records for Donnie Cleveland Lance
9. Northeast Georgia Medical Center records for Donnie Lance - March 28, 1993
10. Georgia Regional Hospital at Augusta medical records for Donnie Lance - Jan. 2004
11. Summary of Interview of Donnie Lance by Special Agent R.W. Wheeler & JSCO investigator David Cochran- Nov. 9, 1997 - 6 pp.
12. Interview of Donnie Lance by Special Agent R.W. Wheeler & JSCO investigator David Cochran- Nov. 9, 1997 - 70 pp.
13. Summary of Interview of Donnie Lance by S/A Wes Wheeler & JSCO inv. David Cochran - Nov. 11, 1997 -1 p.
14. Interview of Donnie Lance by S/A Wes Wheeler & JSCO inv. David Cochran - Nov. 11, 1997
15. Domestic Violence "diaries" written by Joy Lance's family

16. Records of Medical Examiner Dr. Frederick E. Hellman re: autopsies of Dwight Wood, Jr., and Joy Lance
17. Pretrial Testimony of Joe Moore - Sept. 29, 1998 - pp. 214-228
18. Trial Testimony of Joe Moore - June 1999 - pp. 1054-1131
19. Interview of Joe Moore by LCSO Inv. David Cochran, D.A. Tim Madison and Sheriff Stan Evans - Dec. 4, 1997 - 31 pp. + 1 p. summary
20. GCIC of Donnie Lance
21. Department of Corrections File re: Donnie Cleveland Lance
22. GDCP Mental Health Records
23. GDCP Medical Files
24. GDCP Inmate File
25. Trial Transcripts - Volumes IV-X
26. Transcripts from Remand Hearings - 4/13/00, 6/5/00, 2/23/01
27. Transcripts from Pretrial Hearings, dates 8/25/98, 9/28/98 (2 parts), 10/2/98, 11/9/98.
28. Witness Affidavits:
    a. Barbara Brookshire
    b. Brenda Langford
    c. Elaine Watson
    d. Fannie Lance
    e. Gary Watson
    f. Gene Funderburk
    g. Hazel Funderburk Nix
    h. Jimmy Langford
    i. Jimmy C. Lance
    j. John Lance
    k. Joyce Lance
    l. Marty Lance
    m. Rhonda Funderburk Bruce
    n. Walter Tonge

o. David Brookshire
p. Calvin Gooch
q. M.C. Gooch
r. Larry Gooch
s. Danny Hollis
t. James Lance
u. Greg Lance
v. Jerry Lance
w. Stephanie Lance
x. Tony McNeal
y. Billy Pruitt
z. Harold Underwood
aa. Carolyn Waters
bb. Joan Williamson
cc. Sheila Oliver
dd. Clay Oliver
ee. Thomas Hyde, M.D.
ff. Ricardo Weinstein, Ph.D.

APPENDIX B

CURRICULUM VITAE

DAVID PICKAR, M.D.

(301 263-1313)
dpickar@potomacphama.com

POTOMAC PHARMA, LLC

6500 Seven Locks Road
Suite 220
Cabin John, Maryland 20818

Education/Internship/Residency:

1969	Bachelor of Arts Rutgers College, New Brunswick NJ (Phi Beta Kappa)
1973	Medical Degree Yale University School of Medicine, New Haven, CT
1973-1974	Intern, Internal Medicine University of Kentucky Medical Center, Lexington, Ky
1974-1977	Resident in Psychiatry Department of Psychiatry, Yale University School of Medicine, New Haven, CT

Professional Experience:

2001 - present	President and Chief Science Officer, Potomac Pharma, LLC
2001-present	Chairman, Gabriel Pharma, LL
1979-present	Private Practice of Psychiatry Forensic Psychiatry Practice Civil and Criminal Testimony given in DC Superior Court, Maryland Superior Court, Virginia Superior Court Consultant to Special Prosecutor, US Dept of Justice
2001-2002	Science Advisor, Comprehensive Neuroscience, Inc Consultant, DNA Sciences, Inc
1999 – 2001	Chief Science & Medical Officer, Executive Vice President, Comprehensive NeuroScience, Inc.
1991 – 1999	Chief, Experimental Therapeutics Branch, IRP, NIMH
1988 – 1990	Acting Chief, Clinical Neuroscience Branch, IRP, NIMH
1982 – 1999	Chief, Section on Clinical Studies, Experimental Therapeutics Branch (Formerly Clinical Neuroscience Branch), IRP, NIMH

1979 – 1981	Staff Psychiatrist and Chief, Unit on Studies of Drug Abuse, Biological Psychiatry Branch, IRP, NIMH
1977-1979	Clinical Associate, Clinical Neuropharmacology Branch, IRP, National Institute of Mental Health (NIMH), Bethesda, Maryland

Patents

US Patent # 5,492,907 and US Patent #5,663,167
Antipsychotic Composition and Method of Treatment
Inventor
Assignee: The United States of America as represented by the Department of Health & Human Services

US Patents Pending
System for Pharmacogenetics of Adverse Drug Effects: Docket # - 523873000200
System for Genomics and Clinical Trials: Docket # - 523873000100

Military Service:

1977 – 1999 Captain 0-6 (Ret.), USPHS

Society Memberships:

Fellow, American College of Neuropsychopharmacology
New York Academy of Sciences
Phi Beta Kappa
Society of Biological Psychiatry

Board Certifications and Licensure

1974 Diplomate, National Board of Medical Examiners
1978 Diplomate, The American Board of Psychiatry and Neurology
1985 Examiner for Oral Examination
1990 Examiner for Oral Examination

State of Maryland License # D0039290
District of Columbia License # MD10854

Honors And Appointments

1981, '84	Participant in the Exchange of Visits of World Health Organization Investigators in Biologic Psychiatry
1982	A.E. Bennett Clinical Science Neuropsychiatric Research Award of the Society of Biological Psychiatry (with MR Cohen, D Naber, RM Cohen)
1982	NIMH Consultant to the United States Secret Service
1983	Inga Taylor Memorial Lecture, Medical College of South Carolina
1982	1st Prize, Plotzitzko Award (West Germany), for Research in "Endogenous" (with D. Naber)
1984	2nd Prize, Best Journal Paper Award, Academy of Psychosomatic Medicine, for "Biologic Tests in Depression"

1984	Consultant to Crossing Place Halfway House, Washington, DC
1986	Scientific Advisory Committee, American Foundation for AIDS Research
1986	Judith Silver Memorial Young Scientist Award of the National Alliance for the Mentally Ill
1986-87	Chair, Schizophrenia Colloquium, NIMH Intramural Research Program
1987	Co-Chair, Panel on Neurochemistry/ Neuropharmacology, NIMH National Plan for Schizophrenia Research
1987	The Commendation Medal for Exemplary Performance of Duty, DDHS, PHS
1988-99	Program Chair, FAES course: "Psychopharmacology in Practice: Clinical and Research Update"
1991-94	Chair, PET Users' Committee, IRP, NIMH
1993	The Meritorious Service Medal for Exemplary Performance of Duty, DHHS, PHS
1996	Advisory Board to the National Alliance of the Mentally Ill
1996-99	NIMH Institutional Review Board

1998-1999 Chair NIMH Tenure and Promotion Committee

Research Interests

- Schizophrenia
- Neuropharmacology
- Pharmacogenomics ,and Pharmacogenetics
- Experimental Therapeutics

Editorial Board Member

Molecular Psychiatry
Journal of Biological Psychiatry
Progress in Neuro-Psychopharmacology & Biological Psychiatry

Academic Appointments

Adjunct Professor, Psychiatry, Johns Hopkins University, Baltimore MD
Adjunct Professor, Psychiatry, Uniformed Services University of the Health Sciences, Bethesda, MD

Administrative Experience

1979 – 1981 Chief, Unit on Studies of Drug Abuse, Biological Psychiatry Branch, NIMH, Bethesda, MD

1982 – 1990 Chief, Section on Clinical Studies, Experimental Therapeutics Branch (Formerly Clinical Neuroscience Branch), IRP, NIMH, Bethesda, MD

	Chief, 4-East Research Unit, NIMH Clinical Center
1988 – 1990	Acting Chief, Clinical Neuroscience Branch, IRP, NIMH
1991 – 1999	Chief, Experimental Therapeutics Branch, IRP, NIMH
1999-2000	Executive VP, Chief Medical and Science Officer, Comprehensive NeuroScience, Inc
2001	Chairman and CEO, Gabriel Pharma, LLC
2001	President and CFO, Potomac Pharma LLC

Bibliography of over 300 published scientific papers in the field of psychiatry upon request

APPENDIX M

PARK DIETZ & ASSOCIATES, INC.
Forensic Consultants in Medicine
and the Behavioral Sciences

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December 20, 2005

John R. Taylor
Assistant Attorney General
Department of Law
State of Georgia
40 Capitol Square, SW
Atlanta, GA 30334-1300

RE: Donnie Cleveland Lance v. William Terry, Warden
Habeas Corpus, Butts County, Georgia
Superior Court Case No.: 2004-V-490

Dear Mr. Taylor,

I am writing to day to convey the findings and opinions from my examination of Mr. Lance, pursuant to the above captioned matter. You have asked that I review

documents and examine Mr. Lance in order to assist the court in understanding his neuropsychological strengths and weaknesses pursuant to issues raised in his appeal.

Scope of Examination and Informed Consent

I personally examined and tested Mr. Lance at the Georgia Diagnostic and Classification Prison on December 1 and 2, 2005 for a total of approximately six (6) hours, including approximately 4.25 hours over two sessions on December 1st, and an additional 1.75 hours on December 2nd.

The examination was conducted in a semi-private attorney conference room off the main visiting area, and Mr. Lance had his attorney, Elizabeth Wells, present throughout. The examination was also videotaped in its entirety with Mr. Lance's knowledge and consent. Comfort breaks were taken as needed, as well as a lunch break on the first day.

Mr. Lance was advised of the nature and purpose of the examination, that I had been retained by the Attorney General's Office, and that nothing he told me would be confidential. He was also advised that we did not share a traditional doctor-patient relationship, and that I was not there for the purpose of treating him for any disorder he might have. Mr. Lance provided his informed consent to participate in the examination with this understanding.

The examination room itself was quite noisy at times, due to people gathered in the waiting room outside the wire mesh door. Although some testing was deferred until conditions were quieter, there were still periods

where the noise level was felt to be a distraction. This may have had a small detrimental impact on the reliability and validity of the test data obtained, although Mr. Lance was observed to remain focused despite the occasionally noisy testing environment.

Tests Administered

During the course of the present examination, the following battery of tests and procedures was administered to Mr. Lance:

Structured Neuropsychological Interview
Mental Status Examination
Personality Assessment Inventory (PAI)
Rey's 15 Items
Validity Indicator Profile
- Verbal subtest

Wechsler Adult Intelligence Scale – III
- Information Subtest

Finger Oscillation Test
Grooved Pegboard
Copy Cross and Cube
Boston Naming Test
Hooper Visual Organization Test
Controlled Oral Word Association Test (F-A-S)
Animal Naming Test
Halstead Booklet Category Test
Speech-Sounds Perception Test
Seashore Rhythm Test
Trail Making Test, Parts A & B
California Verbal Learning Test
Wisconsin Card Sort
Stroop Color-Word Test
Benton Facial Recognition Test

Interview Schedule for the Psychopathy Checklist - Revised
Clinical Forensic Interview

Materials Reviewed

In addition to the examination and testing of Mr. Lance, the following background materials were reviewed:

(1) Direct appeal opinion.
(2) Affidavit of Ricardo Weinstein, Ph.D.
(3) Transcript of deposition of Dr. Weinstein, 11/22/2005.
(4) Raw test data and notes from Dr. Weinstein's examination of Mr. Lance.
(5) Affidavit of Thomas M. Hyde, M.D., Ph.D.
(6) Notes from Dr. Hyde's examination of Mr. Lance.
(7) Affidavit of Jonathan Arden, M.D.
(8) Report of Psychiatric Evaluation of Mr. Lance by David Pickar, M.D.
(9) Entire case file (as of 6/8/98) regarding Mr. Lance from the Superior Court and State Court of Jackson County regarding case No. M92-CR-0209.
(10) Volume VI of XI from Mr. Lance's jury trial, Georgia v. Lance, Case No. M-98-CR-0000036.
(11) Mr. Lance's mental Health records from the Georgia Department of Corrections.
(12) Mr. Lance's RAP sheet.
(13) Mr. Lance's records from the Jefferson City Schools, Jefferson, GA.

(14) Mr. Lance's medical records from the Georgia Regional Hospital at Augusta, December 23-31, 1993.

(15) Mr. Lance's medical records from the Northeast Georgia Medical Center, March 28, 1993.

(16) Affidavits of:

- (a) Barbara Brookshire
- (b) David Brookshire
- (c) Rhonda Funderburk Bruce
- (d) Gene Funderburk
- (e) Calvin Gooch
- (f) Larry Gooch
- (g) M.C. Gooch
- (h) Danny Hollis
- (i) Fannie Lance
- (j) James Lance
- (k) James Greg Lance
- (l) Jerry Lance
- (m) Jimmy Lance
- (n) John Lance
- (o) Joyce Lance
- (p) Marty Lance
- (q) Stephanie Lance
- (r) Brenda Ann Tolbert Langford
- (s) Jimmy Langford
- (t) Tony McNeal
- (u) Hazel Funderburk Nix
- (v) Clay Oliver
- (w) Shelia Lance Oliver
- (x) Tommy Passmore
- (y) Billy Pruitt
- (z) Walter Tonge
- (aa) R. Robert Tressel
- (bb) James Harold Underwood
- (cc) Carolyn Waters

(dd) Elaine Watson
(ee) Gary Watson
(ff) Joan Williamson

Background Information

On June 23, 1999 Mr. Lance was convicted of murdering two victims and of burglary and possession of a firearm during the commission of a crime that occurred on November 9, 1997. The victims were his estranged wife, Sabrina "Joy" Lance, and her boyfriend, Butch Wood. The evidence at trial indicated that Mr. Wood was shot at least twice with a shotgun, and Joy was beaten to death by repeated blows to her face. Mr. Lance received the death penalty. He is currently appealing his conviction and sentence.

Developmental History

Mr. Lance reported that he was born in Athens, Georgia at the Athens General Hospital on REDACTED/1953. He was unaware of any complications with his mother's labor or delivery, and he reported that although she was a smoker he did not know if she smoked during her pregnancy with him. He stated that she did not drink alcohol or use drugs during her pregnancy, or at all for that matter.

He completed the 12th grade, graduating in 1972 and reported that he was an "o.k." student, getting A's, B's, and C's most of the time. This is also reflected in his school records. He described his favorite subject as math, and his most difficult subject as science. He also took a course in welding at the Lanier Area Vocational-Technical School when he was19, completing the course in March of 1973.

He married Joy when he was 32, and they stayed together for nine years. He has two children, a daughter named Stephanie who is now 20, and a son, Jessie who is now 16.

Medical History

Mr. Lance reported having surgery on both eyes in approximately 1990 to remove a growth caused by dust from car racing. He stated that he began to need reading glasses four-to-five years later, at the age of 43.

In addition to "bumping my head a lot working on cars," he described a series of closed head injuries dating back to approximately 1972. The first involved flipping over in a 1955 Chevrolet near his house in late 1972. He stated he was "banged up a little" but did not need to go to the hospital, although other passengers did. He claimed to have lost consciousness, but "came to" with his car on fire, still holding the steering wheel. He stated that he did not have any significant cognitive sequelae.

The next accident involved running head-on into a ditch in a 1967 Chevelle in 1975 or 1976 while trying to outrun the State Patrol. He denied any injury 'from this accident, but claimed the officer hit him in the fact with a gun after extracting him from the car, requiring hospitalization due to "cracking a bone" under his left eye. He wasn't sure if he lost consciousness, but recalls being dazed and bleeding, and reported that he can still "feel it" in his face.

In 1980, he reported being hit in the head with a lug wrench during a fight in Athens, Ga. after which he stated that he was "knocked koo-koo."

He reported that he had a third accident in 1983 when he drove a 1976 Trans Am into a ditch and flipped it, cutting himself on his right neck and requiring stitches. He was unclear if he experienced any loss of consciousness at that time, but stated that he was dazed.

He also reported "wrecking" race cars "a couple times" while racing, reporting one incident in Athens in 1981 or 1982 when he hit the wall, and doesn't remember anything "until couple of minutes later when they tried to get me out."

Finally, he stated was shot in the back of the head in 1993 while lying on a couch watching TV. He stated that although he was shot in the back of the head, the bullet "ricocheted" and went down his neck. He reported being treated at the hospital, where they left the bullet *in situ*. He complained of feeling dizzy six months later, and stated that he will still get light headed if he gets up too quickly.

His records from Northeast Georgia Medical Center show that he was treated and released on 3/28/93. a CT scan of his head at that time stated:

> Status post gunshot wound to the upper neck just posterior to the occipital bone with no underlying fracture. [Northeast Georgia Medical Center Diagnostic Imaging Results Report, 3/29/93, p. 1]

Results of a skull and cervical spine x-ray stated:

> The examination shows evidence of a gunshot wound to the left inferior occipital region of the skull. No underlying fractures are noted. There are multiple bullet fragments adjacent to the left occipital bone. There are larger bullet fragments which have migrated into the posterior neck posterior to the C!-2 spinous process as well as a second larger fragment which is posterior to the C3 posterior spinous process. No obvious cervical spine fracture noted. No bullet fragments are noted within the canal. [Northeast Georgia Medical Center Diagnostic Imaging Results Report, 3/29/93, p. 1]

Psychiatric History

Mr. Lance denied any pre-incarceration psychiatric history, but stated that he began seeing a doctor at the prison four-to-five years ago, once every six weeks, who prescribes his current medication regime.

However, records from the Georgia Regional Hospital at Augusta indicate that he was treated for a depressive episode between 12/23/93 and 12/31/93, presenting on a hold order from his treating physician and the Jackson County Sheriff's Department due to depression, insomnia, and suicidal ideation. This episode was apparently precipitated by the gunshot wound incident several months earlier. He was treated with Prozac for the depression and Vistaril for sleep, and released to the Sheriff's Department on discharge.

He reported that he is currently being treated with the antidepressant medication Prozac, which he reported taking for "nervousness and depression" over the past five years at a dosage of 10 to 20 mg per day. He also reported that he has high blood pressure for which he takes medication, as well as taking "white pills" for sleep over the past two-to-three years.

Forensic Examination by Dr. Weinstein

Mr. Lance was examined by Dr. Weinstein in April and June of 2005. Dr. Weinstein summarized his findings in his affidavit, stating:

> This results [sic] on the neuropsychological and neurophysiological tests demonstrate that Mr. Lance's executive functioning skills, indicative of complex decision making abilities, information processing skills, judgment, and reasoning abilities, are profoundly impaired. It is my professional opinion to a reasonable degree of psychological certainty that Mr. Lance's results on this testing demonstrates [sic] significant organic brain dysfunction and cognitive impairment. [Dr Weinstein's affidavit, p. 7]

Dr. Weinstein goes on to state that:

> ...these impairments would have negatively impacted Mr. Lance's ability to conform his conduct to the requirements of the law on the night of the crime. It is my professional opinion that, if Mr. Lance committed this capitol felony, he was under the influence of extreme mental and emotional disturbance. Finally, it is my

> opinion to a reasonable degree of psychological certainty, that the brain dysfunction suffered by Mr. Lance would have been significantly exacerbated by the alcohol intoxication [sic] on the night of the crime. [Dr Weinstein's affidavit, p.24]

A careful review of Dr. Weinstein's test data revealed numerous errors in test scoring and/or administration. In addition, his affidavit contains significant misrepresentations with regard to test interpretation, including gross exaggeration of the degree of impairment found in Mr. Lance's test data. For example, he describes functions that are objectively only mildly impaired (or in some cases moderately impaired) as "profoundly impaired," or "vastly exceed[ing] the threshold for impairment," or indicative of "severe brain dysfunction."

Dr. Weinstein stated in his affidavit that differences between Mr. Lance's Verbal Comprehension and Perceptual Organization indexes were "consistent with a history of head injuries." [Dr. Weinstein's affidavit, p. 13] However, when asked about the basis for this opinion during his deposition on 11/22/2005, he refers to different scores altogether (scores that were not significantly different for Mr. Lance) and refers to authorities that make no mention of any correlation between the indexes noted in his affidavit and head injury. [Deposition transcript, p. 29]

Similarly, in his affidavit [at p. 14] he assigns grade levels to Mr. Lance's Wechsler Memory Scale scores and when asked for the authority to support this, he references "a computer program" from the test publisher that provides the scores. This is flatly

incorrect; the test publisher's scoring program does not provide grade equivalents for the WMS-III scales.

Finally, Dr. Weinstein represents his use of quantitative EEG equipment that was developed for use in "neurofeedback," (a form of biofeedback) as if it were comparable to qEEG testing by a medical doctor and appropriate for use in the clinical diagnosis of brain dysfunction in a forensic context. During his deposition, Dr. Weinstein referenced his study with M. Barry Sterman, Ph.D., who developed and markets this and other biofeedback equipment. On Dr. Sterman's website, as part of marketing his training workshops, he includes the following disclaimer:

> The QEEG is presented as a tool for evaluation within the context of neurofeedback protocols and strategies, and not for clinical diagnosis. [http://www.futurehealth.org/sterman.htm]

When asked about the normative reference group used by Dr. Sterman, Dr. Weinstein indicated that those data have not been published, because "It was like a secret ... classified." [Dr. Weinstein's deposition, p. 42] However, on Dr. Sterman's website the data can be found as part of the manual for the SKIL Topometeric software. [www.skiltopo.com/manual.htm]

Forensic Examination by Dr. Hyde

Dr. Hyde, a neurologist, performed a neurological examination of Mr. Lance on April 20, 2005. He diagnosed Mr. Lance with "mild traumatic brain injury" secondary to his gunshot wound, and his series of car accidents; and more specifically with "significant

impairment to the frontal lobe." [Dr. Hyde's affidavit, p. 9]

Forensic Examination by Dr. Pickar

Dr. Pickar, a neuropsychiatrist, examined Mr. Lance on July 15, 2005. He concluded that Mr. Lance "suffers from neuropsychiatric deficits related to serious head trauma," and diagnosed Dementia Due to Head Trauma." Further, he opined that due to frontal lobe dysfunction he suffered from impulsivity and "serious difficulties in planning and organizing events,"... "now and at the time of the crime." [Dr. Pickar's report, p. 3]

Findings From the Present Examination

Behavioral Observations and Mental Status Examination

Donnie Lance is a slim, 51-year-old, right-handed Caucasian man who appears somewhat older than his stated age. He presented for testing on both days neatly groomed, clean shaven, and wearing a white prison uniform with a blue collar and blue trim, and white tennis shoes. He was unrestrained throughout the examination. He brought and used his reading glasses on both days. He was cooperative and effortful throughout the examination and testing.

His motor behavior was unremarkable, with no observable abnormalities of posture or gait. His speech was produced at a normal rate and volume, with clear articulation and a pronounced southern accent. The content of his thoughts was free from evidence of formal thought disorder. His thoughts were expressed in a logical, coherent, and goal-directed fashion. There

was no evidence of fixed, false beliefs (delusions) or unusual sensory experiences (hallucinations), although he did report a tingling sensation over the left temporal-occipital area of his head that occurs two-to-four times per week that he attributed to his gunshot wound. He stated that this sensation is often associated with headaches localized to the same region that persist until he takes "a pill."

Emotionally, his observable affect was mildly anxious and hesitant at first, but he appeared to relax as the examination progressed. His affect was fairly flat, being limited in range and intensity, save for the rare, occasional smile. His insight was fair. He described no recent changes in appetite, with his weight remaining stable at about 170 pounds. He described his sleep as "alright," reporting that he gets eight-to-nine hours of sleep per night, albeit with the aid of sleeping medication (he was unable to recall the name of his sleep medicine). He described his social relationships and activities in prison as "o.k.," and reported that he is emotionally stable. He did complain of some mild age-related memory problems, stating that he is forgetful and "can't remember like I used to."

Data Validity Issues

Testing during Dr. Weinstein's examination (TOMM, Rey's 15 Items), as well as the present examination (VIP, Rey's 15 Items) indicate that Mr. Lance was putting forth a valid effort during the testing, and was not attempting to exaggerate or malinger impairment. Therefore, the test data obtained are felt to provide a reliable and valid estimate of Mr. Lance's current level of neuropsychological functioning

Psychodiagnostic Testing

On objective testing using the PAI during the present examination, Mr. Lance attempted to portray himself as being free from common shortcomings to which most others are willing to admit. However, there is no evidence of a conscious effort to intentionally distort the resulting profile, which is felt to be valid and interpretable.

He produced a "within-normal-limits" profile, with no marked elevations to suggest the presence of clinically significant psychopathology. However, he did report that alcohol use has caused occasional problems in his life; and he may rely on alcohol as a means of reducing stress.

Neuropsychological Testing

A table is appended at the end of this report that summarizes Mr. Lance's neuropsychological test performance over time (including data from both the present examination and Dr. Weinstein's examination), comparing his scores to other men of his age and education.

Analysis of the test data collected by Dr. Weinstein in this case proceeded in the following manner. First, I inspected each available test protocol to establish that the test had been administered in a manner consistent with standard practice. Then I double-checked the scoring of test items and the mathematical calculations required in order to arrive at raw test scores and indexes. Finally, I checked to be sure that all the raw test scores had been converted to standardized scores on the basis of proper norms. I

was guided in this process by the American Psychological Association's Standards for Educational and Psychological Testing and the Specialty Guidelines for Forensic Psychologists.

Numerous mistakes in administration and/or scoring were identified on several of Dr. Weinstein's tests, including the Wechsler Adult Intelligence Scale – III, the Wechsler Memory Scale – III, the Delis-Kaplan Executive Functioning System, and the Halstead Finger Tapping Test. These errors were corrected where possible, and the results reported here reflect those corrections.

Intellectual functioning. Mr. Lance's Full Scale IQ score currently falls at the upper limit of the "Borderline" range (79). His Verbal IQ also fell in the "Borderline" range (78), although his Performance IQ was in the "Low Average" range (84). The six-point difference between his Verbal and Performance IQ scores is not significant, indicating that his skills are evenly developed across these fundamental intellectual domains. Similarly, comparing his scores on the subtests that make up both his verbal and performance IQ scores revealed no significant "scatter;" indicating even development of his abilities within each of these domains. This lack of scatter also argues against any significant loss of function secondary to head injury.

During his deposition, Dr. Weinstein suggested that Mr. Lance was functioning at a higher level prior to the gunshot wound, but stated that it was "difficult to establish what a pre-imposed [sic] level of function is." [Dr. Weinstein's deposition, p. 27] To address this issue, the Oklahoma Premorbid Intellectual Estimate

(OPIE) was calculated for Mr. Lance. The OPIE combines actuarial data with selected current IQ subtest scores that are the least vulnerable to change from brain injury – to arrive at estimates of premorbid IQ functioning.

Mr. Lance's OPIE scores suggest a premorbid Verbal IQ in the Borderline rage (71); a premorbid Performance IQ in the "Low Average" range (83); and a premorbid Full Scale IQ in the "Borderline" range (70). While these estimates are slightly lower than his currently obtained IQ scores, they reflect the same general level of intellectual functioning and do not suggest that there has been a significant loss of cognitive ability secondary to his history of minor closed head injuries.

Academic achievement. Testing of Mr. Lance's academic skills placed his reading at the fifth grade level, this spelling at the sixth grade level, and his arithmetic skills at the high school level.

Memory functioning. Comprehensive memory testing with the Wechsler Memory Scale – III (WMS-3) revealed all of Mr. Lance's memory skills to be operating in the "Average" to "Low Average" range; slightly higher than his overall IQ functioning. His strength areas involve delayed auditory memory.

Surprisingly, he did not perform as well on a test of new verbal list learning (CVLT), somewhat in contradiction to his auditory memory strengths on the WMS-3. His learning curve and short-term recall were in the low average to borderline range, commensurate with his IQ; however his delayed recall and recognition were mildly to moderately impaired. Most significant,

however, was the severe number of perseverative responses he generated. Perseveration refers to repeating previous answers inappropriately, and is often seen in patients with frontal lobe impairment. In addition, he had difficulty initially categorizing the word lists into conceptually related categories (i.e. tools, clothing, spices) to enhance his recall, although he did slightly better with this later in the test. This pattern also suggests some degree of frontal lobe dysfunction.

Language functioning. Mr. Lance obtained his weakest score on a test of confrontation naming (BNT). This test required him simply to name pictures of common objects, and his score fell in the range of severe impairment, suggesting significant difficulty with word finding ability.

Parietal lobe functioning. Mr. Lance's performance was in the low average to borderline range on tests of parietal lobe functioning. He was weakest on a test of facial recognition (BFRT), but within normal limits in his ability to mentally manipulate and identify pictures of common objects from puzzle-like pieces (HVOT). Overall his parietal lobe functions are operating at the level expected given his IQ.

Frontal lobe / executive functioning. Mr. Lance produced mixed results on a wide variety of tests tapping frontal lobe functions. His scores were within normal limits and/or at expectation for the majority of these abilities, including:

- intact ability to inhibit unwanted behavior (Stroop Color-Word)

- intact ability to switch efficiently between competing stimuli (Trail Making Test)
- intact ability for selective attention to competing stimuli (Ruff)
- intact design fluency (D-KEFS)
- intact verbal fluency (F-A-S)
- intact motor planning, problem solving, and inhibition of impulsive responding (Tower Test), and
- intact verbal abstract reasoning (Proverb Test).

He demonstrated variable performance on tests of his ability to solve changing problems and learn from mistakes (WCST, Category Test). On the WCST, he performed at a level expected for his IQ at the time of Dr. Weinstein's testing, but showed mild impairment at the time of the present examination six months later. His performance at the latter examination was characterized by excessive perseveration, i.e., repeating incorrect responses despite verbal feedback. His performance on the Halstead Categories Test was also in the range of mild impairment at the time of both administrations.

He also demonstrated difficulty on a verbal test of his ability to switch back and forth between conceptual categories (e.g., fruits and furniture). He was actually able to switch at expectation, but identified things as furniture that were technically incorrect (e.g., a radio, a refrigerator, etc.) causing him to loose points.

Halstead-Reitan Neuropsychological Battery

On the HRNB Mr. Lance's performance was largely within normal limits for his age and education, and at the level of performance expected for his IQ.

Exceptions here include the mild to moderate impairment already discussed on the Category Test, mild impairment on a test of auditory attention requiring him to discriminate rhythms, and moderate difficulty recalling the shapes of wooden blocks that he had felt and physically manipulated, but never seen (TPT Memory).

Conclusions and Summary of Opinions

Donnie Lance is a 51-year-old man with a history of mild closed head injuries. His neuropsychological test performance is largely at the level expected given his overall "Borderline" intellectual functioning. However, he does present with focal indicia of brain dysfunction, including:

(1) severe impairment in his confrontation naming ability (dysnomia); and

(2) mild to moderate impairment in some frontal lobe / executive functions, in the context of otherwise preserved frontal lobe abilities.

His weaknesses in this latter regard are specifically characterized by (a) a tendency to perseverate; and (b) mild-to moderate impairment in his problem solving abilities in certain contexts (adapting to changing problem situations) but not others (planning effective problem-solving strategies). Notably however, his ability to inhibit unwanted or impulsive behaviors appears to be relatively intact.

Based on his test evidence of impairment in specific memory, language, and executive functions, he does

appear to meet DSM-IV-TR criteria for a diagnosis of Dementia Due to Multiple Etiologies (head injury plus chronic alcohol abuse) at the present time, although the degree of impairment appears to be mild.

With regard to the instant offense, Mr. Lance stated that he did not commit the crime. If this is indeed the case, then his neuropsychological abnormalities would obviously be irrelevant. However, if he is indeed guilty, then the role of his brain dysfunction warrants further discussion.

Dr. Weinstein suggests in his affidavit that Mr. Lance's brain dysfunction "negatively impacted" his ability to conform his conduct to the requirements of the law; that his brain dysfunction constituted an extreme mental and emotional disturbance; and that his brain dysfunction was "exacerbated by alcohol intoxication on the night of the crime."

Little is actually known about his behavior at the time of the crime, as there are no surviving witnesses and he has denied involvement. The existing record reflects a history of significant anger and abuse directed at Joy preceding the instant offense. There was evidence presented at trial that he had a long history of threatening to kill Joy over her relationship with Butch, and of abusing Joy; including "kidnappings, beatings with his fist, a belt, a handgun, strangulation, electrocution or the threat of electrocution, the threat of burning with a flammable liquid and of death by a handgun and with a chainsaw, the firing of a handgun at or near her, and other forms of physical abuse." [Direct Appeal Opinion, p. 6]

What is known about the crime itself is principally reflected in the nature of the homicides themselves. A different method of killing was used for each victim, with Mr. Wood being shot at least twice with a shotgun, while Joy was beaten to death with repeated blows directed specifically to her face.

If one assumes that Mr. Lance was indeed the perpetrator, the evidence indicates that he was able to plan, to the extent that he loaded and brought a shotgun to the crime scene, and apparently attempted to get rid of evidence by asking Joe Moore to dispose of several shotgun shells afterwards. The difference in the way each victim was killed reflects that Mr. Lance was able to switch in his behavior, from shooting to beating (or vice versa). More particularly, the level of personalized violence involved in the focused battery of Joy's face reflects a level of anger specifically directed at her that is consistent with their prior history domestic violence. Joe Moore's trial testimony also provides evidence that Mr. Lance was angry at the victims, referring to Joy as "the bitch" and referring to Butch Wood as having been sent to "Hell."

All this evidence suggests behavior motivated by revenge and driven by anger over losing his wife to Butch Wood. What role his areas of (at the present time) mild-to-moderate focal brain impairment played in the events that day is less clear, and more subject to speculation. Mr. Lance's only area of severe neuropsychological weakness, i.e., dysnomia, would have no bearing on this type of behavior. His frontal lobe deficits largely entail impairment in his ability to solve abstract problems efficiently, due to a tendency to repeat mistakes rather than learn from them. There

is little evidence of frontal disinhibiton that would cause an event like the instant offense.

Alcohol, on the other hand, causes a disinhibiting effect in most people at adequate dosages. It is not clear how much alcohol Mr. Lance had to drink on the night of the crime, or what the relationship between his drinking patterns that night and the crime itself were. Hence, while it is reasonable to assume that alcohol would serve to loosen his controls, and it is also reasonable to assume that alcohol might serve to exacerbate his neuropsychological impairments; it is impossible to specify what role alcohol played in his behavior on the night in question without more information.

Thank you for the opportunity to consult on this challenging case. Please feel free to contact me directly at (949) 760-0422 if you have any questions regarding my examination or opinions in this matter.

Sincerely,

Daniel A. Martell, Ph.D., A.B.P.P.

* * *

APPENDIX N

IN THE SUPERIOR COURT
FOR THE COUNTY OF JACKSON
STATE OF GEORGIA

CRIMINAL INDICTMENT
NO.: M-98-CR-0000036

[Filed December 1, 1998]

THE STATE OF GEORGIA,	)
	)
v.	)
	)
DONNIE CLEVELAND LANCE,	)
Defendant.	)
	)

MOTION TO APPOINT ADDITIONAL COUNSEL

DONNIE CLEVELAND LANCE, by and through his undersigned counsel, respectfully moves this Court pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Section I, Paragraphs 1, 2, 4, 5, 11, 13, 14, 16, 17 and 28 of the Georgia Constitution of 1983; and other applicable law, for the appointment of additional counsel at the county's expense in order to assist the defense of this case. As grounds for this motion, Donnie Cleveland Lance shows as follows:

The Defendant is before the court charged with murder. The State has announced its intent to seek the death penalty.

2.

The undersigned counsel has been hired to represent the Defendant and has done so throughout the motions hearings in this case. However, the Defendant and his counsel have reached the conclusion that the appointment of co-counsel is absolutely essential if Donnie Cleveland Lance is to be represented properly and with the effective assistance of counsel. Specifically, the following aspects of this case mandate the appointment of additional counsel.

(a) There are a significant number of witnesses to interview, witness statements to analyze and criminal records to research for both the guilt-innocence phase and the sentencing phase of trial;

(b) This case includes an extensive amount of scientific and other expert evidence is anticipated and must be analyzed;

(c) It is anticipated that trial preparation for Mr. Lance's case will take up a great deal of time. Additional counsel will allow this sole practitioner the ability to delegate some of the preparation to another qualified attorney so as not to effectively shut down this office for months on end prior to and during the trial of this matter;

(d) There are numerous "other crimes" in the form of similar transactions and prior difficulties which will

be presented at trial necessitating a thorough investigation of each episode involved.

(e) Since upholding the death penalty in 1976, the Supreme Court of the United States has decided more than 100 capital cases. The Georgia Supreme Court hands down numerous decisions regarding this State's capital punishment statute each year. In addition, the federal courts of appeals have decided several hundred capital punishment cases during this time period, almost half of which come from the United States Court of Appeals for the Eleventh Circuit, which includes Georgia. Undersigned counsel has experience with capital litigation, but as a sole practitioner, cannot devote the substantial amount of time needed to review the many decisions which govern the trial and sentencing phase of this case.

(f) Preparation for the guilt-innocence phase of the trial will not be completed before preparation needs to begin for the sentencing phase of trial. Extensive preparation must be made for the sentencing phase in order to rebut the expected aggravating circumstances as well as to develop mitigating evidence.

3.

The District Attorney has had numerous persons assisting in its trial preparation for this case, including but not limited to, personnel from the Georgia Bureau of Investigation, Jackson County Sheriff's Department, Georgia State Crime Lab, and several Assistant District Attorneys. The State has forensic and other experts at its disposal. Since Mr. Lance was arrested and throughout his pretrial hearings, the undersigned counsel and his sole

employee have been the only members of Mr. Lance's defense team.

4.

OCGA §17-12-60(a) specifically provides for the appointment of "one or more attorneys" in a capital case. The American Bar Association Standards require the appointment of two attorneys in a capital case.

5.

Mr. Lance as a result of his indigence, is unable to pay for additional counsel. A defendant of means would employ additional counsel in a capital case of this nature in order to obtain an effective presentation of his case.

WHEREFORE, the Defendant respectfully requests, based on the reasons stated above, that he be appointed additional counsel.

This 30th day of November, 1998.

Respectfully submitted,
/s/ J. Richardson Brannon
J. Richardson Brannon
Attorney For Defendant - Donnie Cleveland Lance
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No. 09-1299

Supreme Court, U.S.
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MAY 27 2010
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In The
Supreme Court of the United States

DONNIE CLEVELAND LANCE,

Petitioner,

v.

HILTON HALL,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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CAPITAL CASE

QUESTIONS PRESENTED

A. SHOULD THIS COURT DENY CERTIORARI REVIEW OF A CLAIM IN WHICH THE STATE COURT PROPERLY UTILIZED THIS COURT'S APPLICABLE PRECEDENT OF *STRICKLAND V. WASHINGTON* IN REJECTING A FACT-SPECIFIC ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL?

B. SHOULD THIS COURT DENY CERTIORARI REVIEW OF A CLAIM THAT WAS NOT RAISED IN THE COURT BELOW AND PRESENTS NO CONSTITUTIONAL QUESTION?

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

I. STATEMENT OF THE CASE

On June 23, 1999, Petitioner, Donnie Cleveland Lance, was convicted of two counts of malice murder, one count of burglary and one count of possession of a firearm during the commission of a crime. The jury found the existence of numerous statutory aggravating circumstances and recommended two sentences of death. The Georgia Supreme Court affirmed the convictions and sentences on February 25, 2002. *Lance v. State*, 275 Ga. 11 (2002), *cert. den'd*, *Lance v. Georgia*, 537 U.S. 1050 (2002).

On May 29, 2003, Petitioner filed his state habeas corpus petition. An evidentiary hearing was held on August 28-30, 2006. The habeas court erroneously granted relief as to Petitioner's death sentence April 22, 2009. Respondent appealed the erroneous grant of relief and Petitioner cross-appealed. Following the filing of briefs and oral argument, the Georgia Supreme Court reversed the erroneous grant of relief and reinstated Petitioner's sentences. *Hall v. Lance*, 286 Ga. 365 (2010).

II. STATEMENT OF THE FACTS

On direct appeal, the Georgia Supreme Court found the evidence at trial established the following:

> The bodies of the victims were discovered in Butch Wood's home on November 9, 1997.

Butch had been shot at least twice with a shotgun and Joy had been beaten to death by repeated blows to her face. Expert testimony suggested they had died earlier that day, sometime between midnight and 5:00 a.m. The door to Wood's home had imprints consistent with size 7 ½ EE Sears "Diehard" work shoes. Joy's father testified he told appellant Joy was not at home when appellant had telephoned him looking for Joy at 11:55 p.m. on November 8. A law enforcement officer testified he saw appellant's car leave appellant's driveway near midnight. When questioned by an investigating officer, Lance denied owning Diehard work shoes; however, a search of Lance's shop revealed an empty shoe box that had markings showing it formerly contained shoes of the same type and size as those that made the imprints on Wood's door, testimony by Sears personnel showed that Lance had purchased work shoes of the same type and size and had then exchanged them under a warranty for a new pair, and footprints inside and outside of Lance's shop matched the imprint on Butch Wood's door. Officers also retrieved from a grease pit in Lance's shop an unspent shotgun shell that matched the ammunition used in Wood's murder.

Joe Moore testified he visited Lance at his shop during the morning of November 9, 1997, before the victims' bodies were discovered. Referring to Joy, Lance told Moore that "the bitch" would not be coming to clean his house that day. Lance stated regarding

Butch Wood that "his daddy could buy him out of a bunch of places, but he can't buy him out of Hell." Lance also informed Moore that Joy and Butch were dead. Moore disposed of several shotgun shells for Lance, but he later assisted law enforcement officers in retrieving them. The State also presented the testimony of two of appellant's jail mates who stated appellant had discussed his commission of the murders.

The State also presented evidence that appellant had a long history of abuse against Joy, including kidnapping, beatings with his fist, a belt, and a handgun, strangulation, electrocution or the threat of electrocution, the threat of burning with a flammable liquid and of death by a handgun and with a chainsaw, the firing of a handgun at or near her, and other forms of physical abuse. Several witnesses testified that appellant had repeatedly threatened to kill Joy if she divorced him or was romantically involved with Butch, and that Lance had also beaten and threatened to kill Butch's wife and several other persons related to Joy. A relative of Joy testified that Lance once inquired how much it would cost to "do away with" Joy and Butch. Towana Wood, who was Butch's former wife, and Joe Moore testified about an invasion of Butch's home committed by Joe Moore and appellant in 1993. The invasion was prompted in part by appellant's belief that Butch was romantically involved with Joy. In the 1993 incident, appellant kicked in a door to the home, entered

> carrying a sawed-off shotgun, and loaded the chamber of the shotgun.

Lance, 275 Ga. 12-13.

On appeal from the erroneous grant of state habeas corpus relief, the Georgia Supreme Court found the evidence establishes the following:

> The evidence at trial showed that Lance had a long history of abusing Joy Lance both before and after they divorced, including kidnapping her, beating her with his fist, a belt, and a handgun, strangling her, electrocuting her with a car battery, and threatening her with a flammable liquid, handguns, and a chainsaw. He had repeatedly threatened to kill her himself, and he had once inquired of a relative about what it might cost to hire someone to kill her and Butch Wood. Lance kicked in the door of Butch Wood's home in 1993 armed with a shotgun, loaded a shell into the chamber of the shotgun, and then fled only after a child in the home identified and spoke to Joe Moore, Lance's friend who was accompanying Lance that night.
>
> Shortly before midnight on November 8, 1997, Lance called Joy Lance's father, asked to speak to her, and learned that she was not at home. Shortly afterward, a passing police officer noticed Lance's automobile leaving his driveway. Lance arrived at Butch Wood's home, kicked in the front door, shot Butch Wood on the front and the back of his body

> with a shotgun, and then beat Joy Lance to death by repeatedly striking her in the face with the butt of the shotgun, which broke into pieces during the attack. Joy Lance's face was rendered utterly unrecognizable. Later that morning, Lance told his friend, Joe Moore, that Joy Lance (whom Lance referred to in a derogatory manner) would not be coming to clean Lance's house that day; that Butch Wood's father could not "buy him out of Hell"; and that both Joy Lance and Butch Wood were dead. Lance later told a fellow inmate that he "felt stupid" that he had called Joy Lance's father before the murders, and Lance bragged to the inmate that "he hit Joy so hard that one of her eyeballs stuck to the wall."

Hall v. Lance, 286 Ga. at 366.

III. DENIAL OF SPECIFIC "FACTS" SET OUT IN THE PETITION

All Experts Did Not Agree Significant Mental Impairments

Contrary to Petitioner's assertions to this Court, all of the experts who testified at the habeas hearing did not agree that the Petitioner suffers from "mental impairments that render him borderline mentally retarded. . . ." (Petition, pp. 11, 13). In fact, Dr. Daniel Martell testified that Petitioner's IQ score of 79 placed Petitioner in the range higher than mild mental retardation and just one point away from being in the low average range. Also, Dr. Thomas Hyde

administered a cognitive screening test, on which the Petitioner scored "very well," and conceded that Petitioner received a "normal score" on this cognitive functioning test. Further, on cross-examination, Dr. Hyde explained, with regard to the frontal lobe dysfunction, that although he gave Petitioner a "fairly extensive neurological examination," over 100 tests, Petitioner performed "normally" on all the tests with the exception of the tapping of the forehead test (glabellar reflex). Dr. Hyde conceded that other tests "assay the function of the cognitive portion of the frontal lobe. And of those, [the glabellar reflex] was the only one that showed any abnormalities. . . ." Accordingly, Petitioner's own experts disagree on Petitioner's level of cognitive functioning. What is clear is that Petitioner was able to run his own business, was a successful mechanic and supported his ex-wife and children until his arrest for the murders in the instant case.

No Records To Review

Petitioner asserts that trial counsel did not review "available medical records regarding petitioner's repeated head traumas" and did not review records pertaining to Petitioner's "hospitalization for mental health treatment." (Petition, p. 8). However, there are no records of Petitioner's "head traumas," except for the gun shot wound to the head. That shot traveled under the skin along the skull and, although Petitioner went to the emergency room, he left after a few hours. Further, the only mental health records were

from East Central Regional Hospital, when Petitioner was being held in Jackson County for the kidnapping and aggravated assault of Joy Lance in 1994 at Christmas, and he claimed he was depressed, so he was referred for mental health treatment.

Experts Agreed On Petitioner's Ability To Commit Crime

Further, although Petitioner argues that the experts found that Petitioner could not have organized and committed the crime, the record shows that Dr. Hyde also conceded on cross-examination that a person with the Petitioner's frontal lobe dysfunction: would be able to make a telephone call to check on the location of his children and be sure they were not present at the impending murder scene; would know how to load a weapon that he had used before; would know how to operate a weapon; would know how to kick in a door as he had done before; would know how to fire a weapon at a person as he had done before; would know how to get into a physical fight with someone as he had done before; and he would know how to hit someone with a weapon to cause injury. Thus, contrary to his direct examination, Dr. Hyde ultimately conceded that Petitioner was capable of committing the crimes for which he has been convicted as Petitioner had previously performed all these acts.

Further, the state habeas court also noted that Dr. Ricardo Weinstein "did not conclude that

Petitioner could not have planned and/or committed the crimes," (State Habeas Order, p. 60), thereby corroborating Dr. Hyde's implicit concession. Moreover, the evidence at trial showed that Petitioner had committed an almost identical crime previously, but was identified at the scene just prior to anyone being shot.[1] Accordingly, it is clear that Petitioner was capable of committing these murders.

Experts Found Petitioner Could Conform His Actions To The Law

Dr. Martell concluded that Petitioner had *minor* brain dysfunction that did not affect his executive functioning which controlled his ability to plan or his executive function of impulse control. Dr. Martell further testified that Petitioner had: the ability to inhibit unwanted behavior; the ability to problem solve; the ability to inhibit impulsive responding; and verbal reasoning. Specifically, Dr. Martell testified that it was his opinion that Petitioner's "ability to inhibit unwanted or impulsive behaviors appears to be relatively intact. And I think that's important in my analysis with regard to the issue of the crime

---

[1] As set forth above, in 1993, Petitioner, believing Butch Wood was romantically involved with Joy, had kicked in the door of Wood's home, "entered carrying a sawed-off shotgun, and loaded the chamber of the shotgun." *Lance*, 275 Ga. 13. Before Petitioner could enter the bedroom where Wood was asleep, he abandoned the crime and ran from the home when Wood's son awoke and identified the person with Petitioner.

itself because these data do not suggest to me that he is, in fact, impulsive or unable to control his impulses." (HT 593).

No "Significant" Changes In Petitioner After Gun Shot Wound

Petitioner asserts that the witnesses testified that the gun shot wound "significantly affected petitioner's behavior" and that he "was different after he got shot in the head." (Petition, p. 11). However, the record shows only that Petitioner's father testified by affidavit that Petitioner was "more quiet" and had headaches after the gun shot and Petitioner's two sisters testified only that Petitioner had headaches after the gun shot. They did not testify to a change in Petitioner's behavior.

Additionally, Petitioner's expert, Dr. Weinstein, testified that Petitioner's actions demonstrated that he had a lack of impulse control before the 1993 gun shot wound and there was no change in the relationship dynamic between the Petitioner and Joy Lance after the 1993 head injury.

Additionally, a witness who went to school with the Petitioner from first through twelfth grade, testified that he did not observe Petitioner acting differently after the 1993 head injury. That witness had contact with the Petitioner after high school and Petitioner remained self-confident and outgoing.

IV. REASONS FOR NOT GRANTING THE WRIT

A. THIS COURT SHOULD DENY CERTIORARI REVIEW AS THE STATE COURT PROPERLY UTILIZIED THIS COURT'S APPLICABLE PRECEDENT OF *STRICKLAND V. WASHINGTON* IN REJECTING A FACT-SPECIFIC ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The Georgia Supreme Court properly utilized *Strickland v. Washington*, 466 U.S. 688 (1984), in reversing the erroneous grant of state habeas relief and correctly determined that Petitioner had failed to establish prejudice based on trial counsel's investigation and presentation of mitigation evidence. Accordingly, this case presents no issue warranting this Court's review.

On appeal, the Georgia Supreme Court found that trial counsel performed deficiently under a *Strickland* analysis with regard to their investigation into Petitioner's background. *Lance*, 286 Ga. 367. The court then held:

> The question then before us is whether trial counsel's deficient performance in failing to adequately investigate issues beyond guilt and innocence, when considered together with any other deficiencies in trial counsel's performance at trial, in reasonable probability changed the outcome of Lance's trial. We hold as a matter of law that it did not.

Lance, 286 Ga. at 368.

Initially, in assessing prejudice, the Georgia Supreme Court held that, if counsel had conducted a proper investigation, it was "doubtful that this information would have led reasonable counsel to seek a psychological evaluation for Lance, particularly given the reasonableness of trial counsel's stated desire to prioritize his request for funds for various experts." *Lance*, 286 Ga. at 369. The court also held that the trial court would not have abused its discretion in denying a request for funds for a psychological evaluation if counsel had asked as the information Petitioner presented in his state habeas did not establish "that the assistance of a psychologist was critical to Lance's defense." *Id.* The state habeas court predicated this finding partly on the fact that Petitioner had "already been examined in a psychological hospital and yet no obvious symptoms of impairment were noted other than Lance's alcohol abuse and his failure to adjust to his divorce." *Id.* The court concluded:

> Given the multiple levels of unlikelihood at issue here – that reasonable counsel would seek an evaluation, that the trial court would grant the request, that the initial evaluation would give any suggestion of a need for a full neuropsychological examination, and that the trial court would have ordered a full neuropsychological examination – we conclude that there is no reasonable probability that a reasonable investigation of Lance's background by counsel would have led to his having access to the type of specialized

> neuropsychological testimony that Lance has presented in the habeas court.

Lance, 286 Ga. at 370.

The Georgia Supreme Court also found that Petitioner's evidence of his "moderate slowness" would not have, in reasonable probability, changed the outcome of the trial in light of the evidence he "functioned normally in society apart from his criminal behavior." *Id.*

The Georgia Supreme Court then conducted a second *Strickland* prejudice analysis presuming Petitioner would have been able to obtain an extensive neuropsychological examination based on the evidence he presented in the state habeas proceedings. *Lance*, 286 Ga. at 370-373. Under this presumption, the court reviewed the testimony of the mental health experts that testified in the state habeas proceedings. The court then concluded:

> Given Lance's long history of contemplating the murder of Joy Lance and Butch Wood, the manner in which he finally carried out their murders, and his utter disregard for their suffering and deaths afterward, we conclude that the new evidence of Lance's subtle neurological impairments, even when considered together with the other mitigating evidence that was or should have been presented at trial, would not in reasonable probability have changed the outcome of the sentencing phase if it had been presented at

> Lance's trial. Compare *Porter v. McCollum*, *supra*, U.S. (III) (130 S. Ct. at 453-456).
>
> We also conclude, contrary to Lance's arguments in his cross-appeal, that the new evidence of subtle neurological impairments would not have significantly affected the jury's deliberations during the guilt/innocence phase. Given the weakness of the new mental health evidence and the overwhelming evidence of the intentional and deliberate nature of Lance's crimes, we conclude that it is essentially beyond possibility that the jury would have failed to convict Lance of the murders. We further conclude that it would have been highly unlikely that the new mental health evidence would have led the jury to render a verdict of guilty but mentally ill, which would not foreclose a death sentence in any event. *See* OCGA § 17-7-131(a)(2) (defining "[m]entally ill"). *See also Lewis v. State*, 279 Ga. 756, 764 (12) (620 SE2d 778) (2005) (holding that "the statute that provides for a verdict of guilty but mentally ill does not preclude a death sentence as the result of such a verdict").

Lance, 286 Ga. at 373.[2]

A mere fact-specific application of these standards, with which result Petitioner disagrees,

---

[2] As set forth above in Respondent's "Denial", these findings of fact by the Georgia Supreme Court are supported by the record.

presents nothing warranting review by this Court. As this Court stated in *United States v. Johnson*, 268 U.S. 220, 227 (1925), "We do not grant certiorari to review evidence and discuss specific facts." *See also Texas v. Mead*, 465 U.S. 1041 (1984). This Court also reiterated in *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974), that this Court's certiorari review is discretionary and "depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

The Georgia Supreme Court clearly conducted a proper *Strickland* prejudice analysis and concluded that had Petitioner presented the same weak mitigation evidence at trial that he submitted in the state habeas proceedings, there was no reasonable probability of a different outcome. This analysis is in direct accordance with *Strickland*. Petitioner's mere disagreement with the factual resolution of his claims by the Georgia Supreme Court does not present a question worthy of this Court's exercise of its certiorari jurisdiction. Accordingly, this Court should deny the petition.

B. PETITIONER'S CLAIM THAT THE ABA GUIDELINES REQUIRE TWO ATTORNEYS TO BE APPOINTED IN DEATH PENALTY CASES WAS NOT RAISED IN THE COURT BELOW, AND ALTERNATIVELY, PRESENTS NO CONSTITUTIONAL QUESTION FOR THIS COURT'S REVIEW.

Petitioner asks this Court to grant certiorari to mandate that the courts conform to the ABA Guidelines and require the appointment of two attorneys in all death penalty cases. However, Petitioner did not raise this claim in his cross-appeal to the Georgia Supreme Court.[3] Accordingly, this claim is not properly before this Court for review. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981); *Youakim v. Miller*, 425 U.S. 231 (1976).

Additionally, even if Petitioner had raised this claim below, it fails to present a constitutional question to this Court as the ABA Guidelines are merely guides. *Strickland*, 466 U.S. at 689.[4]

---

[3] Petitioner did argue that the trial court should have appointed co-counsel under the ABA Guidelines, but only as part of Petitioner's argument that trial counsel was rendered deficient. Petitioner did not argue the appointment of a second attorney in death penalty cases is constitutionally required.

[4] Also of note, Georgia's Unified Appeal Procedure (UAP) did not become effective until January 27, 2000, whereas Petitioner's trial was held in January of 1999. Based on its express effective date, at the time of Petitioner's trial Georgia's UAP did not mandate the appointment of additional counsel to represent

(Continued on following page)

Finally, even if the claim properly presented any constitutional question to this Court, the Georgia Supreme Court's analysis that Petitioner was not prejudiced was in direct accordance with this Court's applicable precedent of *Strickland*. Accordingly, the Georgia Supreme Court properly followed this Court's legal precedent and properly found Petitioner had failed to establish prejudice.

This Court should deny Petitioner's petition for certiorari review of this claim.

Petitioner, especially where counsel was originally retained, as in Petitioner's case.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari seeking review of the judgment of the state court.

Respectfully submitted,

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No. 09-1299

In the Supreme Court of the United States

DONNIE CLEVELAND LANCE,
Petitioner,

v.

HILTON HALL, Warden,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITIONER'S REPLY BRIEF

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For reasons set forth here and in the petition, the Georgia Supreme Court turned the clock back twenty-five years on this Court's Sixth Amendment jurisprudence when it reversed the habeas court's decision vacating the death penalty to which petitioner had been sentenced. First, the Georgia Supreme Court disregarded the requirements of this Court's controlling precedents in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Porter v. McCollum*, 130 S. Ct. 447 (2009), when it reversed the habeas court on the ground that the admittedly ineffective assistance of counsel did not prejudice petitioner "as a matter of law." All of these cases recognize that a defendant may be prejudiced by counsel's failure to present mitigating mental health evidence even when the nature of the crimes may be indisputably brutal or horrific. Second, the lower court improperly attempted to circumvent this precedent by re-characterizing the habeas court's factual findings without the required determination of clear error. Finally, the lower court failed to recognize that counsel's prejudicial ineffective assistance in failing to discover and present mitigating mental health evidence stemmed, in part, from the trial court's refusal to appoint co-counsel requested by trial counsel, a refusal that runs directly contrary to American Bar Association standards, which this Court in *Strickland* and *Wiggins* declared to represent reasonable and prevailing norms of effective assistance of counsel.

I. RESPONDENT IGNORES PETITIONER'S ARGUMENT THAT THE GEORGIA SUPREME COURT ACTED CONTRARY TO CONTROLLING PRECEDENT BY FINDING THAT THE NATURE OF PETITIONER'S CRIME RESULTED IN A FINDING OF NO PREJUDICE.

Donnie Cleveland Lance was represented in his death penalty trial by a single lawyer who failed to conduct any investigation into his mental health and thus offered no evidence at the sentencing phase of the trial on petitioner's significant mental impairments. Petitioner's principal argument in support of certiorari is that the Georgia Supreme Court's determination that, despite the admittedly insufficient investigation and presentation by his counsel, petitioner was not prejudiced "as a matter of law" because of the brutal nature of the murders at issue cannot be reconciled with this Court's decisions in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Porter v. McCollum*, 130 S. Ct. 447 (2009). Remarkably, respondent ignores this argument in his response. Indeed, respondent's brief never refers to *Rompilla*, *Wiggins*, *Williams*, or *Porter*, apparently viewing the jurisprudence on prejudice to have begun and ended with *Strickland v. Washington*, 466 U.S. 688 (1984).

Respondent's failure to address this Court's recent controlling precedents is understandable since the Georgia Supreme Court's decision simply cannot be reconciled with the holdings in those cases. Respondent does not deny that both the habeas court and the Georgia Supreme Court agreed that trial counsel's failure to investigate petitioner's mental

health or to present *any* evidence of petitioner's mental impairments during the sentencing phase of his trial constituted ineffective assistance of counsel. The only question is whether that ineffective assistance was prejudicial to petitioner in his capital defense. The Georgia Supreme Court cited the horrific nature of the murders as justification for its finding that "as a matter of law" the ineffective assistance of petitioner's trial counsel would not have led the jury to reach a different decision and thus did not result in any prejudice to petitioner under *Strickland*. Apparently concluding that the more brutal the crime, the less important mitigating evidence becomes, the Georgia Supreme Court reversed the habeas court's determination and, in doing so, violated fundamental constitutional principles previously affirmed by this Court. Respondent makes no effort whatsoever to explain how this approach can be squared with this Court's decisions.

The Georgia Supreme Court erroneously applied the prejudice analysis of *Strickland* by speculating that, because of the "overwhelming and deliberate nature of Lance's crimes," the outcome of petitioner's trial and sentencing would not reasonably have been affected by new evidence of his mental health. Pet. App. 14a. Respondent devotes much of his opposition to recounting what are indisputably brutal and horrific facts regarding the crime. But it is precisely because the crime was brutal — and thus likely to inflame the emotions of the jury — that the mitigating evidence of petitioner's mental impairments was so crucial for the jury to hear in deciding whether petitioner should live or die. Indeed, the controlling cases *all* involved brutal crimes. *E.g.*, *Rompilla*, 545 U.S. at 374 (finding that "the murder was committed during a felony, that it

was committed by torture, and that Rompilla had a significant history of felony convictions indicating the use or threat of violence"); *Williams*, 529 U.S. at 367 (noting that the trial court found Williams murdered his victim with a mattock after he refused to lend Williams a couple of dollars); *Porter*, 130 S. Ct. at 448 (finding that Porter murdered his former girlfriend and her new boyfriend after driving past her house each of the two days prior to her murder and becoming drunk at a cocktail lounge before shooting them both). The Georgia Supreme Court's holding of no prejudice "as a matter of law" due to the nature of the crime is directly contrary to the U.S. Supreme Court precedents and mandates review by this Court.

II. THE GEORGIA SUPREME COURT CANNOT CIRCUMVENT THIS COURT'S PRECEDENT BY FINDING FACTS ON APPEAL AT ODDS WITH THE TESTIMONY OBSERVED BY THE POSTCONVICTION COURT.

Respondent mischaracterizes petitioner's challenge to the Georgia Supreme Court's prejudice analysis under *Strickland* as a "mere disagreement with the factual resolution" of the claims, contending that the Georgia Supreme Court's decision therefore presents nothing warranting review by this Court. Brief in Opp. at 13-14. This argument, however, highlights the fatal flaw in the Georgia Supreme Court's constitutional review of petitioner's claims: the Georgia Supreme Court purported to reach a "factual resolution" of claims by substituting its read of the cold record for the fact-findings of the habeas court, but it never concluded — because it could not — that any of those fact findings were clearly erroneous.

Appellate courts, either at the state or the federal level, are not supposed to find facts or weigh evidence they do not hear from witnesses they do not observe. *See Brown v. Allen*, 344 U.S. 443, 535 (1953) ("elementary in all appellate procedure [is] that the findings of fact on a trial are to be accepted by an appellate court in absence of clear showing of error") (superseded by 28 U.S.C. 2254(d)(2) only with regard to federal court de novo review of state court determinations of fact). As this Court has long recognized, a trial court, "seeing the demeanor of witnesses, hearing the parties, giving to each case far more time than an appellate court can give, is in a better position to unravel disputes of fact than is an appellate court on a printed transcript." *Id.*; *see also House v. Bell*, 547 U.S. 518, 559 (2006) (noting that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"); *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 448-49 (2001) (trial courts "have an undeniably superior vantage over courts of appeals" with regard to fact finding, because they "view the evidence not on a 'cold paper record,' but 'in the living courtroom context' . . . They can assess from the best seats the vital matter of witness credibility.") (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996)). Recasting as "weak" what the habeas court concluded was "strong" evidence of impairment in an effort to take this case out of the controlling precedents articulated in *Rompilla* and the other cases discussed above is a classic example of reshuffling the factual deck that this Court should not allow.

Under its own decisions and principles of due process, the Georgia Supreme Court was supposed to review the habeas court's legal determinations for legal error and its factual determinations for clear error, a point respondent does not dispute. *See, e.g.*, *Hall v. Terrell*, 679 S.E.2d 17, 21 (Ga. 2009) (the Georgia Supreme Court accepts a habeas court's findings of fact unless they are clearly erroneous); *Head v. Carr*, 273 Ga. 613, 616 (2001) (same). On the facts as found by the habeas court and applying the U.S. Supreme Court's controlling precedent, it is clear that the habeas court properly granted relief. The Georgia Supreme Court's reversal of the habeas court was improper for two reasons. First, with respect to the facts, the Georgia Supreme Court never concluded that any of the habeas court's findings were clear error, and for good reason — the findings were all grounded in the extensive evidence that the habeas court had carefully evaluated. And second, with respect to the law, there is no attempt to reconcile the Georgia Supreme Court's decision with the U.S. Supreme Court's most relevant precedent. Instead, respondent's entire Brief in Opposition depends on highlighting "facts" conjured up by the Georgia Supreme Court and ignoring the teachings of controlling precedent.

On numerous occasions, respondent's arguments turn on characterizations of the evidence by the Georgia Supreme Court that conflict with findings of the habeas court that were never found to be clearly erroneous. For example, the habeas court found that petitioner suffers from "significant mental impairments" due to his history of car wrecks, drinking, and getting shot in the head. The habeas court explained its finding as follows:

> While the mental health experts had varying opinions as to the degree and effect of Petitioner's mental impairments, *all of the mental health experts, including those employed by Respondent, testified that Petitioner suffered from mental impairments that render Petitioner borderline mentally retarded, and all provided testimony that would have been extremely important for the jury to consider . . .*

Pet. App. 89a (emphasis added). Giving no deference to the habeas court's impressions of live expert testimony, the Georgia Supreme Court second guessed the habeas court's determinations, finding instead that

> aspects of [Lance's mental health evidence] showed merely that Lance functioned, when sober, in the lower range of normal intelligence; that he had some memory problems; that he suffered some depression related to his inability to accept his divorce; that he suffered some difficulty in planning and problem solving; that he might have been somewhat impulsive; and that his functional intelligence, unsurprisingly, become more impaired when he was drunk.

Pet. App. 13a. Likewise, the habeas court noted that the mental health experts testified that petitioner suffered from borderline mental retardation, contrary to respondent's reliance on the Georgia Supreme Court's unsupported suggestions that petitioner was merely "moderate[ly] slow[]". Brief in Opp. at 12; Pet. App. 97a.

Stated simply, respondent's brief — like the decision of the Georgia Supreme Court that it seeks to

defend — selectively ignores the well-supported findings of the habeas court to create an impression of a widespread agreement among the experts that petitioner's mental deficiencies were limited. Brief in Opp. at 8. But the habeas court's findings of fact regarding the opinions of the mental health experts were clearly supported by the experts' testimony and the record before it, and no amount of recasting of this evidence can obscure the habeas court's finding that "*all [of the experts] provided testimony that would have been extremely important for the jury to consider . . .*" Pet. App. 89a (emphasis added). As petitioner pointed out in his initial filing, the standard is not whether these facts would have necessarily led the jury to a different decision, but whether there is a "reasonable probability" that one or more jurors might have reached a different decision, such that the confidence in the process is undermined. Pet. at 21-22. Respondent's arguments to the contrary on pages 5 and 6 of his Brief in Opposition are unavailing when the Georgia Supreme Court made no determination of clear error with respect to the factual finding of the habeas court.

This is a compelling case for this Court to review. If a state appellate court can avoid complying with this Court's binding precedents by recasting facts on appeal and determining that the recast facts mean that "as a matter of law" there is no prejudice, precedent can always be easily circumvented. In *Williams v. Taylor*, for example, the Virginia Supreme court could have simply "found," contrary to the habeas court, that Mr. Williams was not "borderline mentally retarded" and had not "suffered repeated head injuries." 529 U.S. 362, 370 (2000). Likewise, in *Porter v. McCollum*, the Florida Supreme Court could have simply found that

Mr. Porter did not have "heroic" war service, had not been abused as a child, and did not have a "brain abnormality." 130 S. Ct. 447, 454 (2009). And in *Rompilla*, the Georgia Supreme Court could have simply "found" that Mr. Rompilla did not have "schizophrenia and other disorders," 545 U.S. at 390, but instead only limited mental impairments that would not have been compelling to a jury. This Court's pronouncements regarding ineffective assistance of counsel claims can only be given effect if the court tasked with making factual findings after an evidentiary hearing is given deference in its factual findings and is not second-guessed on appeal. The Georgia Supreme Court failed to give proper deference to the factual findings of the habeas court and thus performed an end-run around the constitutional requirements by "finding" facts aimed toward turning demonstrated prejudice into "no prejudice" "as a matter of law."

III. PETITIONER'S CLAIM REGARDING THE FAILURE TO OBTAIN CO-COUNSEL IS PROPERLY BEFORE THIS COURT AND WARRANTS REVIEW.

Respondent argues that petitioner did not raise the claim in cross-appeal to the Supreme Court of Georgia that failure of his trial counsel to obtain co-counsel in his death penalty trial, contrary to ABA Guideline 2.1 and this Court's findings in *Strickland*, *Williams*, and *Wiggins*, constituted prejudicial ineffective assistance. This claim, including the constitutional aspect of the claim, was indeed raised upon cross appeal:

> The ineffective assistance of counsel in Petitioner's case stemmed in part from the fact

> that the trial court denied Petitioner's requests for appointment of co-counsel. The 1989 American Bar Association Guidelines in effect at the time of Brannon's trial state: "In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant." ABA Guideline 2.1. The commentary to this guideline explains that "*the defendant [in a capital case] is constitutionally entitled to legal assistance of sufficient quality so as to prepare an adequate defense at trial* .... In the context of capital litigation, this mandate is difficult to fulfill where the heavy responsibilities of representation are placed in the hands of a single attorney."

Brief of Cross Appellant at 19-20 (emphasis added). Petitioner went on to argue that the "trial court's decision resulted in a denial of representation for Lance that comported with accepted professional norms and standards for adequate representation in a death penalty case.... The constraints Brannon faced materially contributed to his failure to discover and present significant evident to the Trial Court, to Lance's great prejudice." *Id.* at 21-22. Because petitioner raised this claim before the Georgia Supreme Court below, it is properly before this Court for review.

In addition, the fact that petitioner was denied co-counsel in his death penalty trial, contrary to ABA Guidelines, which this Court has found articulate reasonable standards regarding effective assistance of counsel, represents a constitutional question

implicating the Sixth Amendment.[1] *Wiggins*, 539 U.S. at 522 citing *Strickland*, 466 U.S. at 688-89 (commenting on trial counsel's duty to investigate: "Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable"). The Georgia Supreme Court failed to recognize that ineffective assistance stemming from this infirmity conflicts with guidelines promulgated by the American Bar Association regarding the defense of capital cases and cannot be squared with this Court's precedent. Whether petitioner's Sixth Amendment rights to effective assistance of counsel were violated by the failure of the trial court to allow petitioner the benefit of co-counsel in his death penalty trial is a constitutional question properly before this Court for review.

Finally, petitioner was prejudiced by the trial court's failure to appoint co-counsel because it placed trial counsel, a sole practitioner, in an untenable situation. As petitioner described in cross appeal to the Georgia Supreme Court: "[Brannon] had too much to do in the limited time he had and with the limited resources available in a sole practitioner's office. By Mr. Brannon's own account, he was unable to investigate the 30 prior incidents that the State gave notice it intended to rely on at trial or even to

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[1] Contrary to Footnote 3 of Respondent's Brief in Opposition, that petitioner argued in the context of an ineffective assistance of counsel claim that he should have had the benefit of co-counsel at his death penalty trial reflects a distinction without a difference. The argument that effective assistance of counsel as required by the Sixth Amendment mandates the assistance of two attorneys in a capital case does in fact represent a constitutional question.

interview all of the witnesses on the State's witness list." Brief of Cross Appellant at 21. Because petitioner's trial counsel could not, by himself, investigate and present all available evidence regarding petitioner's mental health, the jury was not informed of mitigating mental health evidence that could have persuaded a single juror to spare his life at the sentencing phase of his trial. The fact that petitioner's counsel utterly failed to present any mitigating mental health evidence to the jury caused petitioner great prejudice and rendered his death sentence fundamentally unfair.

IV. CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court summarily reverse the judgment of the Supreme Court of Georgia because that court's decision contravenes established law. If the Court does not order summary reversal, it should grant certiorari to address the important, recurring issues of federal law raised in this petition.

This 8th day of June, 2010.

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In the
Supreme Court of the United States

DONNIE CLEVELAND LANCE,

PETITIONER,

v.

HILTON HALL, WARDEN,

RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Donnie Cleveland Lance respectfully requests that the Court grant rehearing and enter an order (1) vacating its denial of the petition for writ of certiorari, entered on June 28, 2010, and (2) granting the petition. For reasons set forth below, rehearing is warranted in light of this Court's recent per curiam decision in *Sears v. Upton*, No. 09-8854, 2010 WL 2571856 (U.S. June 29, 2010), granting certiorari to the Supreme Court of Georgia. This Court issued *Sears* on June 29, 2010, one day after the Court denied certiorari in this case.

Sears makes clear that when trial counsel's investigation into mitigation evidence at the penalty phase of trial is constitutionally inadequate, the habeas court must undertake a "probing," "fact-intensive" inquiry to determine whether counsel's deficient performance prejudiced the defendant. *Sears* cannot be reconciled with this case. Here, the Georgia habeas court undertook precisely the probative, fact-intensive inquiry that this Court's precedents mandate and granted habeas relief after making careful fact findings based on its first-hand consideration of evidence and live testimony, only to have the Georgia Supreme Court brush aside its factual determinations and, reinterpreting the cold record, conjure up its own appellate fact findings as a basis for concluding that counsel's deficient performance was not prejudicial "as a matter of law."

For reasons explained below, the Georgia Supreme Court's decision cannot be reconciled with the fundamental principles that *Sears* recognizes

and reaffirms. Accordingly, because it appears that this Court may not have fully appreciated the close similarities between *Sears* and this case, petitioner respectfully seeks rehearing.

In addition, rehearing is warranted to avoid unnecessary confusion among the lower courts and to ensure that this Court's remand in *Sears* is not rendered a meaningless exercise for which the outcome is preordained. The Court's decision in *Sears* does not prejudge the result of the remand, but it necessarily recognizes that the Georgia habeas court, after undertaking the appropriate inquiry, might find that counsel's failure to conduct an adequate mitigation investigation prejudiced Sears. If the Georgia Supreme Court's decision below is not corrected, however, the result of the remand in *Sears* is all but assured and this Court's decision is nothing more than an advisory opinion requiring a costly round of unnecessary further proceedings.

The Georgia Supreme Court concluded in this case that, *as a matter of law*, petitioner was not prejudiced by his counsel's constitutionally inadequate mitigation investigation because the evidence of petitioner's borderline mental retardation, organic brain damage, dementia, alcohol abuse, and depression would have no reasonable probability of changing at least one juror's mind about imposing the death sentence. App. 14a. Accordingly, because the mitigating evidence in *Sears* is on its face much weaker and the aggravating evidence arguably stronger than the evidence in this case, if the Georgia Supreme Court's decision below is left standing, it is hard to fathom how the habeas court on remand in *Sears* would not

be required to deny relief as a matter of law. Instead of putting the habeas court in that untenable position, with conflicting directives from this Court and the Georgia Supreme Court, the Court should grant review in this case and take steps to ensure that its mandate in *Sears* is faithfully and meaningfully applied.

I. The Court Should Grant Rehearing In Light Of Its Subsequent Decision In *Sears v. Upton*.

On June 29, 2010, following its order denying certiorari in this case, the Court granted certiorari in *Sears v. Upton*, No. 09-8854, 2010 WL 2571856 (U.S. June 29, 2010). In *Sears*, the Court addressed virtually identical questions to those presented in Mr. Lance's petition—namely, how should courts apply the prejudice standard for evaluating Sixth Amendment claims when the performance of counsel's mitigation investigation at the penalty phase of trial is constitutionally inadequate. In reaffirming that the prejudice inquiry requires a "probing" and "fact-specific" analysis, *Sears* reached a conclusion directly at odds with the Georgia Supreme Court's decision in this case. If this case had been decided one day after *Sears*, rather than the other way around, *Sears* would have controlled.

1. In *Sears*, a Georgia jury sentenced the defendant to death for a brutal rape-murder. Sears kidnapped a 59-year old mother from a supermarket parking lot, punched her in the face with brass knuckles, handcuffed her in the back of a car, drove her across state lines, raped her, and then forced her into the woods where he stabbed her in the neck until she died. *See Sears*, 2010 WL 2571856, at *12

(Scalia, J., dissenting). In light of these "horrendous acts," it was important for trial counsel to conduct an adequate mitigation investigation in an attempt to convince the jury not to impose a sentence of death.

During the penalty phase of trial, Sears' counsel "presented a reasonable mitigation theory and offered evidence sufficient to support it." *Id.* at *10 (Scalia, J., dissenting). That evidence was aimed at convincing the jury that Sears grew up in a stable and loving environment, and that a death sentence would devastate his family. *Id.* at *3. Because they did not complete an adequate investigation, however, Sears' counsel were unaware of mitigation evidence that could have affected the jury's sentence. As the Court's decision recounts, mitigation evidence emerged during the post-conviction proceedings showing that Sears "suffers from substantial cognitive impairments," *id.* at *4, as a result of "hitting his head at a roller-skating rink," "running into an end table as a child," and "getting hit with a golf club sometime later in elementary school." *Id.* at *11 (Scalia, J., dissenting). Other evidence not considered by the jury showed that Sears grew up in an abusive family, was learning disabled, and suffered from drug and alcohol abuse in his teens. *Id.* at *2, 4.

In the state habeas proceedings, Sears argued that his trial counsel rendered ineffective assistance in failing to develop mitigation evidence concerning his mental capacity and family background, and that the mitigating evidence was sufficiently compelling to undermine confidence in the jury's sentence. The state post-conviction court denied

habeas relief. It found that, although trial counsel's performance was constitutionally deficient, because trial counsel had presented a different mitigation theory to the jury, it was "not possible to know what effect a *different* mitigation theory would have had." *Id.* at *10 (Scalia, J., dissenting) (emphasis in original). The habeas court concluded that Sears had not demonstrated prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and was, therefore, not entitled to post-conviction relief.

2. After the Georgia Supreme Court summarily denied review, Sears filed a petition for review with this Court. The Court granted that petition on June 29, 2010, vacated the lower court's judgment, and remanded for further proceedings. In a per curiam opinion, the Court reaffirmed and clarified the prejudice standard that, in "all circumstances," courts must apply when evaluating "a claim of ineffective representation in the context of a penalty phase mitigation investigation." *Sears*, 2010 WL 2571856, at *8.

The Court held that, although the state habeas court appeared "to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances" of *Sears'* case. *Id.* at *6. The Court explained that the "*Strickland* inquiry requires" a "*probing* and *fact-specific analysis*." *Id.* at *8 (emphasis added). Noting that this Court has consistently and "categorically rejected" the type of "truncated" approach taken by the habeas court, the Court reaffirmed that, in "all circumstances," a "probing inquiry" is the "proper prejudice standard for evaluating a claim of ineffective representation in

the context of a penalty phase mitigation investigation." *Id.*

The Court remanded for the habeas court to undertake a proper analysis of prejudice under *Strickland*. That analysis, the Court explained, must take "into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments ... to assess whether there is a reasonable probability that Sears would have received a different sentence" had the jury been able to consider the evidence. *Id.* Although the recent evidence, described in detail in Justice Scalia's dissent, could reasonably be construed as supporting the habeas court's ultimate conclusion—*i.e.*, that the available mitigation evidence would not "have persuaded a jury to change its mind about the death sentence for this brutal rape-murder," *id.* at *9 (Scalia, J., dissenting)—the majority decision rejected any suggestion that facts could be "found" on appeal. Instead, the Court concluded that "it is for the state court," and not an appellate court, to undertake the required analysis "in the first instance." *Id.* at *8–9.

3. The Court's decision in *Sears* confirms that the Supreme Court of Georgia in this case has radically departed from precedent and that its decision should not be allowed to stand. In this case, unlike in *Sears*, the state habeas court conducted precisely the type of probing, fact-intensive analysis called for under this Court's controlling decisions. In a painstaking review of the evidence presented during the post-conviction proceedings, the habeas court found that, "in light of the strength of the mental health evidence offered at the habeas

hearing," there was a reasonable probability that, but for trial counsel's deficient performance, the outcome of the penalty phase of trial would have been different. App. 101a.

The specific factual findings made by the habeas court confirm that the mitigation evidence in this case was much stronger than the evidence in *Sears*. As the habeas court found, "all of the mental health experts, including those employed by the Respondent, testified that" Mr. Lance suffers "from mental impairments that render [him] borderline mentally retarded." App. 97a. The evidence recounted by the habeas court include testimony from well-credentialed experts that Mr. Lance has "brain damage [frontal lobe damage] as a result of traumatic brain injury or the addictive effects of alcohol abuse"; has been "treated for depression and anxiety"; satisfies the criteria for dementia due to head injuries and chronic alcohol abuse; and has an IQ of 78, placing him in the "borderline range of intellectual abilities." App. 97a–98a (alteration in original). As the experts testified, and as the habeas court found, Mr. Lance's "neuropsychiatric impairments" would have "significant implications" for his "behavior at the time of the murders." App. 98a.

Unlike in *Sears*, Mr. Lance's counsel presented no reasonable mitigation theory and offered no evidence in mitigation at the penalty phase of trial, including what the trial court found to be "easily obtainable psychiatric mitigating evidence." App. 90a. Moreover, unlike in *Sears*, the readily available evidence of Mr. Lance's "significant mental impairments" was solid and credible. *Cf. Sears*,

2010 WL 2571856, at *11 (Scalia, J., dissenting). As the trial court explained, it was well known to his friends and family that Mr. Lance had been "shot in the head" and that, because he fled the hospital against his doctor's orders, this head wound was never properly treated. App. 94a. The evidence further showed that Mr. Lance suffered "terrible" and recurring headaches, was hospitalized "for mental health treatment," had a "longstanding drinking problem," regularly "experienced dizziness" that made it difficult for him to work, and was "often involved in wrecks while racing cars," but "rarely, if ever, sought medical care following these wrecks." *Id.*; *see also* App. 6a–7a (noting that Mr. Lance had been exposed to "toxic fumes," ingested "gasoline as a child" and had "temporarily stopped breathing," and was depressed). The trial court found that all of this evidence was readily available from Mr. Lance's "family" and "friends" and from "other members of the small-town community" in which Mr. Lance lived, but none of it was offered in mitigation at sentencing. App. 94a.

4. Although the state habeas trial court, based on its own findings of fact, determined that habeas relief was warranted, the Georgia Supreme Court reversed. The Georgia Supreme Court did not purport to show that any of the habeas court's factual findings were "clearly erroneous." App. 4a (acknowledging that habeas court's factual findings are reviewed for clear error). It instead merely concluded that, "as a matter of law," the habeas court's prejudice determination was wrong because, in its view, the available mitigation evidence "would not in reasonable probability have changed the outcome of the sentencing phase if it had been

presented" to the jury. App. 14a. Moreover, according to the Georgia Supreme Court, and contrary to the habeas court's findings, it is unlikely that trial counsel would have been informed of any significant neurological deficits that would have justified further investigation. App. 8a.

But, significantly, these "legal" conclusions are not based on any "facts" found by the habeas court. Instead, the Georgia Supreme Court brushed aside the habeas court's careful fact findings and based its decision on its own reinterpretation of the record evidence. According to the Georgia Supreme Court, Mr. Lance's neurological deficiencies are "mild," *id.*, and Mr. Lance suffers only from "moderate slowness." App. 9a. Notwithstanding the substantial contradictory evidence presented at the habeas hearing, in the Georgia Supreme Court's view the evidence "showed merely" that Mr. Lance "functioned, when sober, in the lower range of normal intelligence," had "some memory problems," suffered "some depression," had "some difficulty in planning and problem solving," and "might have been somewhat impulsive." App. 13a. The Georgia Supreme Court thus concluded that Mr. Lance was not prejudiced by his counsel's deficient performance: "Given Lance's long history of contemplating the murder[s], ... the manner in which he finally carried out [the] murders," and "his utter disregard" for the "suffering and deaths" of his two victims afterward, "we conclude that the new evidence of Lance's subtle neurological impairments, even when considered together with the other mitigating evidence that was or should have been presented at trial, would not in reasonable probability have changed the outcome of the

sentencing phase if it had been presented at Lance's trial." App. 14a.

5. The Georgia Supreme Court's recasting of the record evidence and made-up appellate fact-findings are not supported by the totality of mitigation evidence presented to the state habeas court. But, more significantly, the approach taken by the Georgia Supreme Court is directly at odds with *Sears* and this Court's other precedents. *See* Pet. 16–21 (showing how the Georgia Supreme Court's decision conflicts with this Court's decisions in *Porter v. McCollum*, 130 S. Ct. 447 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); and *Williams v. Taylor*, 529 U.S. 362 (2000)).

The whole point of *Sears* is to require the state habeas court to engage in a fact-intensive inquiry to determine whether there is a reasonable probability that available mitigation evidence would have affected the jury's death sentence. The process that *Sears* contemplates is only meaningful if the habeas court's factual findings, unless shown to be clearly erroneous, are entitled to appropriate deference on appeal. It makes no sense to require habeas courts to engage in a probing, fact-intensive inquiry if whatever factual findings and conclusions they reach after holding an evidentiary hearing are second-guessed and brushed aside by appellate courts. If that were permissible, there would have been no reason to remand in *Sears*. This Court is just as capable as the Georgia Supreme Court of drawing conclusions from the cold record and engaging in appellate fact-finding.

II. The Court Should Grant Rehearing To Ensure That The Remand In *Sears* Is Not Rendered Meaningless.

Rehearing is also warranted to avoid confusion within the lower courts in Georgia as to the binding force of this Court's precedents. Unless the Court grants rehearing, the combination of its decision in *Sears* and its denial of certiorari in this case, leaves Georgia habeas courts in a hopelessly confused situation. Under this Court's precedents, as reflected in *Sears*, when confronted with a Sixth Amendment claim, Georgia courts are required to engage in a probative, fact-intensive inquiry to determine whether counsel's deficient performance was prejudicial. Under the controlling Georgia Supreme Court precedent in this case, however, any fact-findings resulting from that inquiry become irrelevant because, *as a matter of law*, exactly the type of mitigation evidence that this Court reaffirmed in *Sears* as relevant to a jury's sentencing decision is to be disregarded in any capital case where the murder can be characterized as heinous and the defendant shows "utter disregard" for the suffering and death of his victims.

This concern is especially relevant in *Sears* itself. Even construed in the most favorable light, it appears that the mitigation evidence in *Sears* is much weaker than the mitigation evidence available in this case. As Justice Scalia's dissent shows, no matter what findings are ultimately made by the state habeas court on remand, it would be possible to interpret the record on appeal to characterize the mitigation evidence in *Sears* as weak and unconvincing. *Sears*, 2010 WL 2571856, at *10–12

(Scalia, J., dissenting). Regardless of what the state habeas court might find on remand, Sears could be said to suffer from "mild" neurological deficiencies and "moderate slowness." App. 9a. It is also possible to show that the aggravating circumstances of Sears' crime are at least as heinous as those of petitioner's. *See id.* at *12 (Scalia, J., dissenting). Accordingly, unless the Georgia Supreme Court's decision in this case is corrected, the outcome of the remand in *Sears* is a foregone conclusion. No matter what fact findings are made by the habeas court, the Georgia Supreme Court will hold that, as a matter of law, Sears is not entitled to habeas relief. *Cf. NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (express concern when remands are an "idle and useless formality").

Accordingly, to ensure that this Court's remand in *Sears* is not a meaningless formality, the Court should vacate its order denying the petition. It should then grant the petition and either summarily reverse the Georgia Supreme Court's decision below or undertake plenary review.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for writ of certiorari, the Court should grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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